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IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1916.

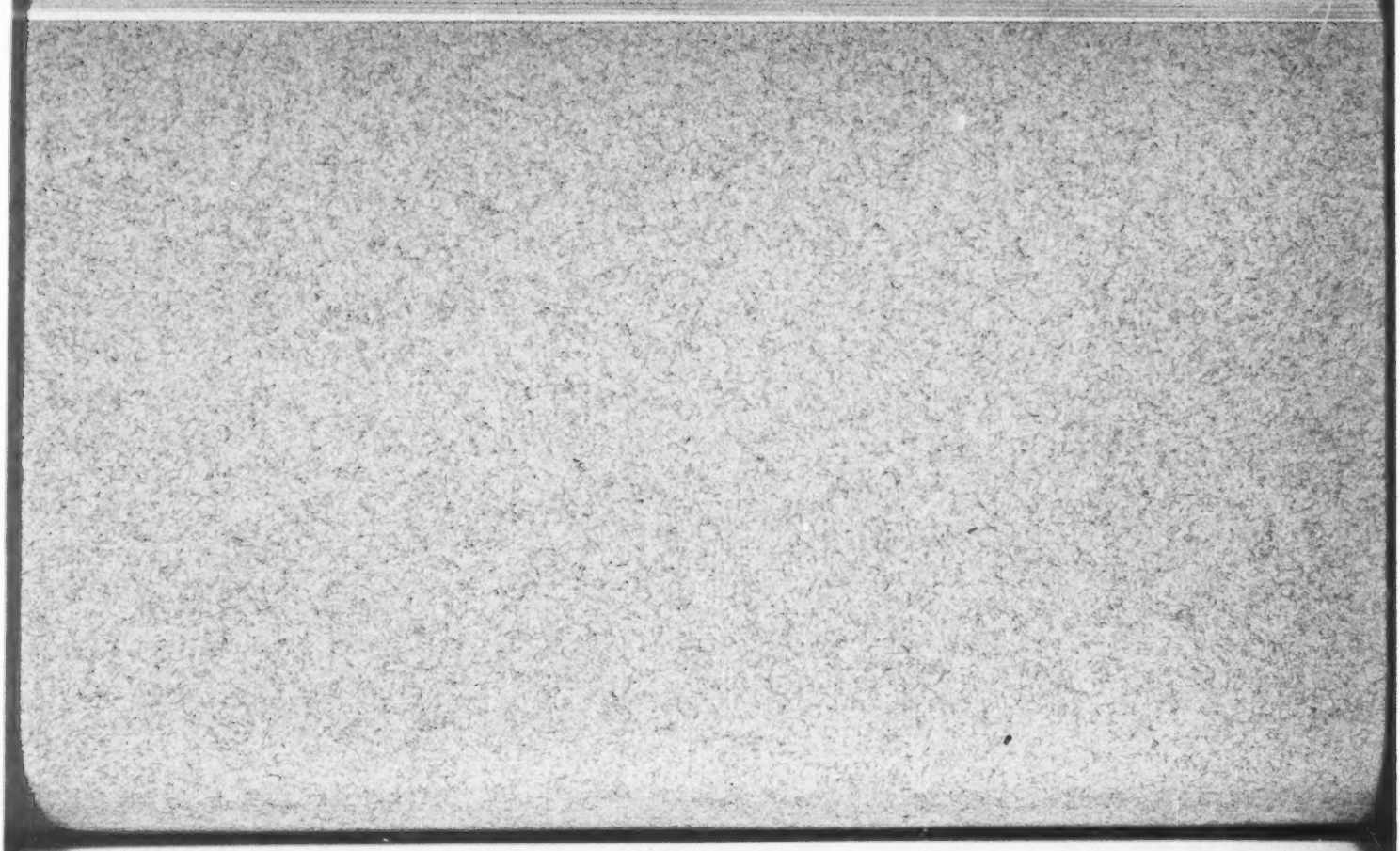
BOARD OF TRADE OF THE CITY OF CHICAGO, et al.,
Appellants,
vs.
UNITED STATES OF AMERICA,
Appellee.

Appeal from United States District Court, Northern District of Illinois.

BRIEF FOR APPELLANTS.

MR. HENRY S. ROBBINS,
FOR APPELLANTS.

BARNARD & MILLER PRINT, CHICAGO.



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This is an appeal from a decree obtained by the United States in the District Court at Chicago against the Board of Trade of the City of Chicago, et al., holding that the so-called "Call" rule of the Board of Trade violated the Sherman Anti-trust Act, and enjoining the further observance or enforcement of that rule, etc.

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STATEMENT.

The only question presented by this appeal is—does a rule of the Chicago Board of Trade, which in purchases of grain "to arrive" limits to certain hours price-making by its members, violate the Sherman Act?

So claiming, the Government filed its bill against this exchange and its directors, and obtained a decree enjoining the further maintenance or enforcement of this, or any other similar rule. From that decree the present appeal was perfected.

Appellant, Board of Trade, exists under a special charter granted by the State of Illinois, in 1859, to

certain persons (Rec., 148), which confers authority "to establish such rules, regulations and by-laws for the management of their and the mode in which it should be transacted, as they might think proper."

The objects of this association are (Rec., 3):

> "To maintain a commercial exchange, to promote uniformity in the customs and usages of merchants, to inculcate principles of justice and equity in trade, to facilitate the speedy adjustment of business disputes, to acquire and disseminate valuable commercial and economic information, and generally to *secure to its members the benefits of co-operation in the furtherance of their legitimate pursuits.*"

No limit is placed either by this charter or otherwise upon the number of members. Any male person of good character and credit may become a member. (Rec., 115, 151.)

This exchange has more than 1,500 members and has for many years maintained in Chicago an exchange hall, where its members trade in many of the products of the farm, but principally grain and provisions.

The exchange does not itself participate in any of this trading. It neither buys nor sells anything. Its only functions are to maintain an exchange room where its members may meet to trade, to determine who shall be its members, to maintain rules to enforce compliance by members with their contracts and with rules relating to the terms of such contracts, the method of delivery, payments and the deposits of money as security upon contracts, to provide arbitrating tribunals, and to exercise disciplinary power over members.

Trading by its members is of different kinds.

Grain, after it has reached Chicago and is either in cars or elevators is extensively sold by sample and warehouse receipts. The rule in question does not relate to this kind of trading. (Rec., 111.)

Another kind of trading (Rec., 10, 115) consists in the making of contracts of purchase and sale for delivery in a future month. The Board of Trade provides a space called a "pit," for each of the leading commodities so traded in, to which members desiring to trade for future delivery in such commodity resort. This "pit" trading is by *viva voce* bidding. It includes not only such as is speculative in character, but also a large volume of "hedging," which is a method of obtaining a species of insurance against price fluctuations, as is explained in

Board of Trade v. *Christie*, 198 U. S. 236.

The rule in question does not relate to this kind of trading.

A third kind of trading—and the one to which the rule does apply—is the purchase and sale of grain "to arrive." This consists in sending out from Chicago daily bids for grain by members of this Board of Trade,—generally by mail, but occasionally by telegraph,—to grain dealers at country points within the grain section tributary to Chicago. The terms of such trading permit the shipment of the grain within a certain number of days—usually ten, but sometimes more. (Rec., 146.)

These bids prescribe the time, within which the acceptance of the offer must be received in Chicago by the bidder, and this is usually before the opening of the market at 9:30 a. m. the next morning.

The rule in question was adopted in 1906, and was operative until after the institution of this suit —when it was replaced by another rule, which is not here assailed.

The rule in question here reads as follows:

> "Sec. 33. A. The Board of Directors is hereby empowered to establish a public 'Call' for corn, oats, wheat and rye to arrive, to be held in the exchange room immediately after the close of the regular session of each business day.
>
> B. Contracts may be made on the 'Call' only in such articles and upon such terms as have been approved by the 'Call' committee.
>
> C. The 'Call' shall be under the control and management of a committte consisting of five members appointed by the president with the approval of the Board of Directors.
>
> D. Final bids on the 'Call' less the regular commission charges for receiving and accounting for such property may be forwarded to dealers. It is the intent of this rule to provide for a public competitive market for the articles dealt in and that with such market all making of new prices by members of this association shall cease until the next business day.
>
> E. Any transaction of members of this association made with intent to evade the provisions of this rule shall be deemed uncommercial conduct and upon conviction such member shall be suspended from the privileges of the association for such time as the Board of Directors may elect."

The bill alleges (Rec., 5):

> "That the *purpose* and *intent* of said Board of Trade and its members in the enactment of said rule was * * * to prevent all competition among the members of said Board of Trade and the firms and corporations, with which said members are connected in dealings

> relating to corn, oats, wheat, and rye to arrive from the time of the public 'call' immediately after the close of the regular session of each business day until the opening of the session of said Board of Trade upon the next business day, * * * and that the *effect* of said combination and conspiracy has been and is to fix and control during the periods between the regular sessions of said Board of Trade the prices to be offered and paid for wheat, corn, oats and rye to arrive," including grain shipped from other states to Chicago.

The regular sessions of the Board are from 9:30 a. m. until 1:15 p. m., except on Saturday, when the exchange closes at 12 m.

The answer (Rec., 10-11) denies that either the purpose, intent, or effect of this rule was to impair or prevent competition, or to fix or control prices or to restrain trade, and alleges that such rule merely extended to this class of trading a time limit like that imposed by another of its rules, which limits trading for future delivery to certain trading hours, and that the rule in question had been adopted for the purpose of creating a broader and more constant market, and also to promote the health, comfort and welfare of its members and "that in thus limiting the trading by its members to such market hours, it has but followed a practice and precedent established by most commercial exchanges in this country as well as in Europe, among whom it has always been customary to limit to a more or less extent the hours for trading."

These allegations of the answer were supported by the evidence of a number of witnesses. (See appendix to this brief.)

Upon the motion of appellee the court struck out paragraph VI of the answer. (See Point V of this brief.)

Upon a final hearing the court, after hearing evidence, entered a decree (Rec., 165) adjudging that by enacting and enforcing such rule appellants had become parties to a combination or conspiracy to restrain interstate trade in violation of the Sherman Anti-trust Act, and permanently enjoining the Board of Trade "*and its members* and all persons acting or claiming to act for or on behalf of any of its members * * * from carrying out or attempting to carry out" such conspiracy, or any other like combination or conspiracy, and from agreeing or acting together directly or indirectly for the purpose or with the effect of fixing or maintaining a certain price or any price for grain for any specified time or times.

ERRORS RELIED UPON.

1. That the court erred in finding that the defendants were parties to a combination or conspiracy in restraint of trade, and in entering a decree in favor of appellee.
2. That the court erred in not dismissing the bill for want of equity.
3. That the decree is erroneous, because it enjoins intra-state commerce.
4. That the court erred in striking out paragraph VI of the answer.
5. That the decree is too broad in that it enjoins future acts of defendants respecting the fixing of prices, which acts are in no way similar to the rule in question.

ARGUMENT.

Point I.

THE SCOPE OF THE RULE.

The rule affected only bidding by *members* of this exchange.

It related only to buying and selling of grain "to arrive," that is, grain purchased for shipment within a specified time to Chicago.

It did not apply to grain in store or on track in Chicago. (See also, Rec., 94, 146.) A member could any afternoon after the close of the "call" buy grain in elevators or cars in Chicago at other than the call price without violating the rule.

These contracts "to arrive" are essentially contracts for future delivery, and differed from the other contracts for future delivery made on this exchange only in that the times of delivery, instead of being confined to some day in a named month, are, because of the time consumed in transportation, somewhat uncertain.

Another feature of this trading "to arrive" is, that (except between members of the Board residing in Chicago) it usually starts with a bid upon a post card mailed in Chicago. This is especially true as to so much of this trading as will be claimed to be interstate in character.

This necessarily places a practical time limit upon the restriction imposed by the rule; for the postal

cards containing the prices must be deposited in the Chicago postoffice in time to reach the addressees early enough to enable them to get their telegraphic replies back to Chicago by 9:30 o'clock the next morning. (Rec., 114, 115.)

Many of these mails close at 3:45 p. m., and the final mails close between half past five and half past six o'clock. (Rec., 114, 115.)

Some time is consumed in the clerical work of writing the bids and getting them into the postoffice. In some cases the bids are printed.

Occasionally, however, where the business was of enough volume to warrant the expense, the bids were sent by day letters or telegrams. Generally the aim prior to the adoption of the rule was to have these bids ready by about two o'clock, but if certain conditions arose, it might be late in the afternoon. (Rec., 21, 114, 115.)

Hence in practice the restriction was at best only for a period of two or three hours at the end of the business day.

Again the rule applied only to bids sent out from Chicago *after the close of the call* at about two o'clock p. m. It imposed no restriction whatever upon this bidding between 9:30 a. m. and the close of the call. A large part of this bidding for grain "to arrive" took place during the market hours. (Rec., 100, 107.)

Again, the rule imposed no restraint upon any member in buying, as members often did, grain to be shipped to other markets than Chicago. The rule applied only to grain bought on "Chicago weights and inspection," and to be shipped to Chicago. (Rec, 94.)

There was no restriction upon the sending out of bids after the close of the call, but only upon the fixing of the prices to be inserted in such bids.

In other words, the rule required members, who desired to buy grain "to arrive," to make up their minds before the close of the call, what price they wished to pay that afternoon. It also made it to their interest to bid on the call, and if they did not there get sufficient grain, to see that the final bid on the call was high enough to enable them to bid the country. It thus ineffect compelled their presence upon the call.

Hence the real restriction was upon the period of price-making. The rule required members to desist from further price-making after the close of the call (about two p. m.) until 9:30 a. m. the next morning.

Another feature was that there was no restriction on the bidding during the call. The price bid to the country was the final bid on the call (less the commission), and this final bid was the result of all the competitive bidding members desired to indulge in.

Thus the question here is, whether a rule of a commercial exchange, which operates only upon its members and limits their price-making at Chicago only about two or three hours at the end of the business day, is under the trade conditions surrounding that market a restraint of trade in violation of the Sherman Act.

Point II.

THE LEGAL TEST.

It is not, and could not well be, claimed that this rule was an attempt to "monopolize" commerce, within the second section of the Sherman Act; especially as it imposed no restriction during the major part of the business day and in some of the territory, within which it was operative, members of this exchange were in competition with members of other exchanges.

The first section of the Sherman Act provides that "every contract, combination in form of a trust, or otherwise, or conspiracy in restraint of trade or commerce * * * is hereby declared to be illegal."

The Sherman Act, though an example of terse, lucid and comprehensive diction, necessarily used the most general terms in defining the kind of arrangements it sought to interdict. Thus it uses the phrase "in restraint of trade."

The correct meaning of this phrase has been much discussed. Happily this controversy has been put at rest by the decision of this court in

Standard Oil Co. v. *U. S.*, 221 U. S. 1.
U. S. v. *American Tobacco Co.*, 221 U. S. 106,

establishing what has come to be known as "the rule of reason."

In the *Standard Oil* case this court construed the Sherman Act as prohibiting only "contracts or acts which were unreasonably restrictive of competi-

tive conditions, either from the nature or character of the contracts or act, or where the surrounding circumstances were such as to justify the conclusion that they had not been entered into or performed with the legitimate purpose of reasonably forwarding personal interest and developing trade;" but rather "with the intent to do wrong to the general public, and to limit the right of individuals, thus restraining the free flow of commerce and tending to bring about the evils, such as enhancement of prices, which were considered to be against public policy;" and as not restraining acts "which did not unduly restrain interstate or foreign commerce."

The effect of that decision was "to leave it to be determined by the light of reason, guided by the principles of law and the duty to apply and enforce the public policy embodied in the statute, in every given case, whether any particular act or contract was within the contemplation of the statute."

The *American Tobacco* case, in reaffirming the Standard Oil case, held (p. 179) "that the statute did not forbid or restrain the power to make normal and usual contracts to further trade by resorting to all normal methods, whether by agreement or otherwise, to accomplish such purpose."

The following subsequent cases reinforce these views:

U. S. v. *Union Pacific Co.*, 226 U. S. 61.
U. S. v. *Reading Co.*, 226 U. S. 324.
Nash v. *U. S.*, 229 U. S. 373.
Eastern Lumber Assn. v. *U. S.*, 234 U. S. 600.

Earlier cases were to the same effect.

U. S. v. *Joint Traffic Assn.*, 171 U. S. 568.
Hopkins v. *U. S.*, 171 U. S. 600.
Anderson v. *U. S.*, 171 U. S. 615.

In the *Joint Traffic Assn.* case, this court said:

> "An agreement entered into for the purpose of promoting the legitimate business of an individual or corporation, with no purpose to thereby affect or restrain interstate commerce, and which does not directly restrain such commerce, is not, as we think, covered by the act, although the agreement may indirectly and remotely affect that commerce."

In the *Anderson* case, this court in sustaining a rule of an exchange said:

> "Where the subject matter of the agreement does not directly relate to and act upon and embrace interstate commerce, and where the undisputed facts clearly show that the purpose of the agreement was not to regulate, obstruct or restrain that commerce, but that it was entered into with the object of properly and fairly regulating the transaction of the business in which the parties to the agreement were engaged, such agreement will be upheld as not within the statute, where it can be seen that the character and terms of the agreement are well calculated to attain the purpose for which it was formed, and where the effects of its formation and enforcement upon interstate trade or commerce is in any event but indirect and incidental, and not its purpose or object. * * * The same is true as to certain kinds of agreements entered into between persons engaged in the same business for the direct and *bona fide* purpose of properly and reasonably regulating the conduct of their business among themselves and with the public. If an agreement of that nature, while apt and proper for the purpose thus intended, should

> possibly, though only indirectly and unintentionally, affect interstate trade or commerce, in that event we think the agreement would be good."

The court also held in the *Anderson* case that the effect on interstate commerce of the rule there in question was "too small to be taken into account."

Thus the question here is, whether a rule of an exchange, which prohibits for two or three hours at the end of each business day its members from participating in price-making for grain "to arrive" at Chicago, materially directly and unduly restricts competition or obstructs trade.

Is the present rule anything more than a normal method of accomplishing the purposes, for which this exchange was organized and a reasonable exercise of a legitimate function of the exchange?

Is its prejudicial effect, if any, upon interstate commerce so direct and substantial as to come within the Sherman Act, or so indirect and incidental as to be "too small to be taken into account?"

The legal test being thus established—in determining, whether this particular rule is within the statute, all the facts and circumstances existing at the time of its enactment, as well as its effect, are to be taken into consideration.

Anderson v. *U. S.*, 171 U. S. 605.

Continental Paper Co. v. *Voight*, 212 U. S. 266.

U. S. v. *St. Louis Terminal*, 224 U. S. 395.

In the *St. Louis Terminal* case, this court held that it could not be determined, whether the Act violated the Sherman Act "without a consideration

of natural conditions, greatly affecting the railroad situation in St. Louis."

While, doubtless, a contract or act may be *per se* a violation of the statute—that is, so necessarily and directly a violation as to render the intention unimportant—still, in all cases presenting the question, whether the act is anything more than a normal and usual method to further trade, the intention or purpose of the parties necessarily becomes a fact to be considered.

U. S. v. *Union Pacific R. R.*, 226 U. S. 61.
U. S. v. *Reading Co.*, 226 U. S. 370.
U. S. v. *St. Louis Terminal*, 224 U. S. 394.
Swift v. *U. S.*, 196 U. S. 396.

In the *Union Pacific* case, *supra*, the court said:

> "In determining the validity of this combination we have a right to look also to the intent and purpose of those who conducted the transaction from which it arose and to the objects had in view."

POINT III.

THIS LEGAL TEST APPLIED TO THE FACTS.

The bill alleged that the purpose and intent, as well as the effect, of the rule was to restrict competition and restrain trade, while the answer averred that such was neither its purpose, intent or effect.

Upon the issues thus raised the Government introduced no evidence. Its evidence was directed only to showing the meaning of the rule, how transactions under it were carried on, the volume of trading in the Chicago market, the number of persons partici-

pating therein, etc. It was thus content to stake its case upon the terms of the rule, which it claims to be such that compliance therewith necessarily must result in such restriction of competition as is violative of the Sherman Act.

On the other hand, appellants examined many witnesses to show that the purpose and effect of the rule was harmless, and would have introduced many more, had not the trial judge suggested (Rec., 137) that to do so would unnecessarily cumulate evidence.

This evidence shows (Rec., 97, 98, 107, 22, 111, 142 to 144) that the purpose of the rule and of those enacting it was (1) not to restrict competition in trade, but to promote the interest of the Board of Trade by bettering existing trade conditions, under which most of this trading "to arrive" had largely concentrated in a few hands, and other members of the exchange were being driven out of this business, and to otherwise better trade conditions, and (2) to restrict reasonably the hours for trading, and thereby promote the health and comfort of members. (Rec., 98.)

In other words, the evidence shows that one purpose was to improve market conditions by providing a more competitive public market, and inducing more members to participate in this trade. (Rec., 22, 111.)

The rule itself declares that "it is the intent of this rule to provide for a public competitive market for the articles dealt in, and that with such market all making of new prices by members of this association shall cease until the next business day."

This evidence also shows (Rec., 117 to 122, 123,

125, 126, 129) that one *effect* of the rule was to benefit the country shippers, including the numerous corporations organized by farmers to facilitate the marketing of their crops. In one state alone, Iowa, the evidence shows that there were from 330 to 340 farmers' companies having about 65,000 farmers as their stockholders. (Rec., 119.)

The managers of three of these farmers' elevator companies—one of them having been at one time a candidate for Governor of Iowa, and none of them being a member of this exchange—testified that this Call rule was beneficial to them, and specified among its benefits that it enabled them to participate in this trading "to arrive," and also furnished them better information of the Chicago prices on grain "to arrive," thus enabling them to buy grain upon a smaller margin of profit, and that under the rule they were not confined—as they had been before the rule—to the delivery of grain arriving in Chicago on any particular railroad, but could fulfill their contracts with grain arriving on any railroad.

Several members of the Board of Trade, who act as commission merchants for these farmers' companies, testified (Rec., 130 to 133) to the same effect.

Three members of the Board of Trade, whose business is buying grain in Chicago to ship east, also testified (Rec., 137, 140, 141) that the rule benefited their business, in that it enabled them to acquire grain for their shipments through purchases upon the call of grain "to arrive," and that thereby they were enabled to accept lower bids from the east, because they were able to operate on smaller margins of profit.

A number of members of the Board of Trade testified—and many more would have testified, if the court had not regarded the evidence as unduly cumulative—that the rule benefited trade (Rec., 98, 105, 107, 11, 133, 136-142, 144, 147) by increasing the numbers of bidders for grain "to arrive," by bringing more of that trade into the open market during market hours, by making more generally known the afternoon bid price for grain "to arrive," and by creating through an increase of bidders a more competitive price than that prevailing before the enactment of the rule. Some testified that the rule increased prices by reducing the risk, and thereby the margin of profit, of the middleman. Many of them also specified as a benefit the fact that the rule permitted a broader contract, under which grain arriving on *any* road could be delivered upon these contracts for grain "to arrive."

Several of the few large dealers and owners of elevators, against whom the rule was aimed, were called to testify by the Government (Rec., 95, 99, 100, 105, 106), but none of them testified that the rule was really restrictive either as respects the volume of the grain affected or the prices thereof. Indeed, James A. Patten, a member of one of the largest of these grain buying firms, and the largest individual grain dealer in the country, testified that in his judgment the Call rule did not affect prices. (Rec., 105.)

For the convenience of the court and to avoid an undue enlargement of this brief, some of the evidence of these witnesses is set out in an appendix to this brief.

Thus the uncontradicted evidence shows that this rule did not restrain trade, nor restrict competition. At least, if it did, such restriction was only incidental, and "too small to be taken into account." For while the period of price-making was thereby reduced, the rule brought into this kind of trading many more bidders, whose participation therein made the afternoon price for grain "to arrive" a much more competitive one than it was before the rule was enacted.

The only effect of this rule on the bidding was to compel bidders to make up their minds a little earlier in the afternoon, what price they were willing to bid that afternoon for grain "to arrive," and to subject this price to a stimulating influence from the open bidding by other traders.

No witness testified that the result of this rule was to lower prices. Some testified affirmatively that it had no effect whatever upon prices. Others thought it bettered prices to the producers without increasing it to the consumers. (Rec., 118, 124, 129.)

Indeed, when the conditions are analyzed, it is difficult to see how this suspension of price-making for two or three hours at the end of the day could prejudicially affect competition.

The rule did not change the times when the country shippers received their bids. These were fixed by the mail schedules. It only required these Chicago bidders to be a little more expeditious in determining what prices they would bid.

Nor did this reduction in the hours of price-making lessen the volume of such trading in Chicago. The quantity of wheat for sale was not by this rule

reduced one bushel. Nor did it reduce the number or requirements of those who needed the nourishment furnished by the existing supply of grain. It affected neither the supply nor the demand.

Nor is it conceivable how it could in any substantial way have affected the prices obtainable by owners of grain. Its only effect was either to bring competition into play a little earlier in the day or to postpone it until 9:30 a. m. the next morning.

Persons bidding in Chicago for grain "to arrive" there do so, because they know of a use, to which they can probably put the grain they bid for. They want it either for, or to sell at once to, millers, exporters, etc., or to hold until others will later take it off their hands at a profit. Is it at all probable that the number of these persons wishing to buy grain "to arrive" for one or the other of these purposes, or the quantity each wanted, was lessened by an inability to bid for it other than the call price between 2 o'clock one day and 9:30 o'clock the next? If the miller, exporter, or speculator wants the grain, he will want it just as much the next morning. If he is not able to get it upon the Call or subsequently at the Call price, he will buy it the next morning, because the reasons, which induce him to want it, are not at all affected by this short suspension of trading in the afternoon.

Nor will prices be thereby affected; for the speculator, miller, or exporter fixes his price from a consideration of the supply and demand and other trade conditions, which this rule did not affect.

Thus how can any one affirm that the competition, if delayed until the next morning, will not be as keen,

and result in as good prices, as if it took place in the preceding afternoon, or that by inducing the attendance at the call of prospective bidders for grain "to arrive" and thus subjecting them to a stimulating influence from the open bidding there, prices will not be *beneficially* affected sa much as, or more than, the suspension of bidding at the end of the day will *prejudicially* affect them. How can it be certainly affirmed that compelling traders to bid the call price for any grain they wish to buy after 2 o'clock any afternoon will not lead them to pay more than they otherwise would as often as, or more often than, it would prevent them from paying, more than the bid price.

In short, to use an expression of this court, is not the restraint of trade, if any, imposed by this rule "too small to be taken into account?"

It may be accurately described as a rule, which somewhat reduced the *time* of price-making, without prejudicially affecting prices, and it is difficult to see how it violated the Sherman Act.

This evidence also shows that this rule was only a normal method of accomplishing some of the objects, for which this organization was created—"to maintain a commercial exchange" and "to secure to its members the benefits of co-operation in the furtherance of their legitimate pursuits." These objects were furthered as follows:

It shortened the hours of price-making, and thereby contributed to the health and comfort of members.

It also forced more of this trading "to arrive" into the regular trading hours, and upon the ex-

change floor, thus distributing it among more members and thereby rendering it more profitable to be a member of the association.

It also carried to country shippers in a wider area a prompter knowledge of the prevailing prices for grain "to arrive," and thereby encouraged more country shippers to ship their grain to the Chicago market.

It also prevented an undue concentration of this kind of trading among a few large dealers, who could more readily agree upon a bid to be sent out to country shippers.

It also facilitated this trading "to arrive" by enabling participants therein to fulfill their contracts by delivering grain arriving upon any railroad entering Chicago.

It also placed country shippers in closer touch with the Chicago prices, and thereby enabled them to accept smaller margins of profit, thus increasing the prices to farmers and making the Chicago market a more attractive one to ship to.

It also enabled the grain merchants of Chicago, who sell to millers, exporters and consumers, to work upon a closer margin of profit, and thereby to pay more for their grain in Chicago, or sell it cheaper, thus making the Chicago market more attractive to shippers and grain buyers.

These results all helped to make the grain market maintained by this Board of Trade a larger and better one for shippers, and the exchange a more profitable one for traders to be members of.

A rule which accomplished these results surely

must be deemed a normal method for promoting the business of the association.

This will be more apparent when we consider what are the proper functions of an exchange.

The comprehensive purpose of this exchange, as declared in its enumeration of objects, is "to maintain a commercial exchange."

No exchange can exist unless it attracts members. Few will join or remain in an exchange, unless it is to their personal interest to do so. An exchange is an expensive thing to maintain. The yearly expense of this exchange is about $395,085.26. (Rec., 115.) The principal source of revenue of all exchanges is from the dues collected from its members. Thus, to induce persons to be members of an exchange, the value of the benefits it confers upon a member should exceed his share of the cost of maintaining the exchange.

The chief benefit to members—as well as the chief utility to the public—is the maintenance of a market, and the broader that market—that is, the larger the volume of its trade and the number of its trading members—the greater the advantage to the members as well as to the public. The Chicago Board of Trade is a greater exchange than some of its rivals, because it has more active members and attracts a greater volume of trade, and it thus provides a more constant market.

The very idea of an exchange suggests an exclusion of persons, and consequently some restriction of free competition. An exchange cannot establish and maintain a market without resorting to restrict-

ions, which necessarily somewhat impair the right of both members and non-members to trade.

Thus it is the function of every exchange to maintain a trading room, where its members may meet to trade. This bringing together of traders to a particular place is what makes a public market. In doing this every exchange does and must provide that non-members may not personally trade there; for this compels them to become members, or to employ members as their agents. This is in a sense a restraint upon trade. But no one will claim that it is an undue restraint of trade within the Sherman Act.

So—although this exchange does not do so—it is a legitimate function of an exchange to limit the number of its members with a view to making it more profitable for persons to become members. This somewhat restrains trade by preventing many persons from participating personally, either for themselves, or as agents, in the trading on the exchange. Yet no one will claim that to be a restraint of trade within the Sherman Act.

Again, most exchanges exercise the right to compel their members to refrain from trading with suspended members, and whenever this has been called into question the courts have sustained it.

Gladish v. *Kansas City Exchange*, 113 Mo. App. 726.

But clearly that is not an undue restraint under the Sherman Act.

Again, many exchanges find it necessary, in order to maintain a high character of business integrity among members and induce persons to be mem-

bers, to prescribe, and to compel members to conform to, minimum rates of commissions. This has also been generally recognized as a legitimate function of an exchange, and in the few instances in which it has been questioned the courts have sustained its legality.

Board of Trade v. *Dickinson*, 114 Ill. App. 295.

State v. *Duluth Board of Trade*, 107 Minn. 506.

Yet these rules do restrain trade by restricting competition in commission rates among members, whom outsiders desiring to buy and sell on these exchanges are obliged to employ. Will any one contend that such a rule is an undue restraint of trade, or anything more than a normal regulation reasonably adopted to accomplish the purposes, for which exchanges exist?

Most exchanges also exercise the right to confine trading by their members within certain trading hours, and to suspend or expel members trading at other times. The evidence shows (Rec., 159, 163) that every important exchange in this country does this. It is one of the recognized and usual functions of exchanges; for the shorter the hours the more active and constant is the market. The volume of trading being dependent entirely on other conditions, it follows that the maintenance of trading hours lessens the interval between individual trades, and the shorter those hours, the less these intervals, the more constant the market and the more successful the exchange in creating a market, in which the public may buy or sell at any moment when it is in session.

Another benefit accruing from restricted market hours is the promotion of the health, comfort and welfare of members, by securing to them leisure and freedom from business cares the latter part of the day.

The Chicago Board of Trade has for years maintained a rule confining future trading in its exchange building or in its vicinity to less than four hours a day. (Rec., 155.)

In the only case, in which it has been questioned, this right of the exchanges has been upheld.

State v. *Milwaukee Chamber of Commerce,* 47 Wis. 670.

This limitation of hours for business or work is not confined to exchanges. Banks universally prescribe and conform to shorter business hours than other branches of business. Labor unions combine to shorten hours. Legislatures and Congress compel eight hour days for many who work.

Merchants may, within reasonable limitations, agree among themselves to limit their business hours without being guilty of undue restraint of trade.

Stovall v. *McCutchen,* 107 Ky. 577.

Yet these rules of exchanges prescribing market hours do materially restrain trading at other times than these trading hours. They not only restrain members of the exchange in the making of their own trades, but restrain the trading of non-members, because a large volume of the trading of members is as agents for non-members. Will it be contended that these rules fixing trading hours unduly restrict trade, or are other than normal regulations of the

exchange to accomplish the legitimate purposes, for which it is organized? Will it be claimed that Congress, in enacting the Sherman Act, intended to abolish the trading hours of the exchanges?

The rule in question is nothing more than a rule limiting the trading hours of its members, and having for one of its purposes the promotion of their health, comfort and welfare by enabling them to be free from the anxiety of price-making in the later hours of the day.

True it differs from most of these exchange rules prescribing trading hours, in that it prohibits during the non-trading hours members from trading with non-members, while such rules ordinarily deal only with trading between members. But this is a difference in form rather than substance; for rules limiting the trading hours between members in effect restrict trading by non-members. They are thereby prohibited, during the prescribed period, from trading through their agents. A restraint upon the free right to trade, if injurious to the public and unlawful at all, must be so when traders are acting through agents as well as when they are trading personally.

Again a rule of an exchange, which prohibits its members from trading with non-members, is in a sense a restraint upon trade. Yet this court has held that such a rule does not violate the Sherman Act.

Anderson v. *U. S.*, 171 U. S. 604.

There the rule of a live stock exchange prevented its members from trading with other yard traders, who were not members, and with those, who traded

with such yard traders as were not members of the Association; but this court held the rule not violative of the Sherman Act, saying:

> "From very early times it has been the custom for men engaged in the occupation of buying and selling articles of a similar nature at any particular place to associate themselves together. The object of the association has in many cases been to provide for the ready transaction of the business of the associates by obtaining a general headquarters for its conduct, and thus to ensure a quick and certain market for the sale or purchase of the article dealt in. Another purpose has been to provide a standard of business integrity among the members by adopting rules for just and fair dealing among them and enforcing the same by penalties for their violation. The agreements have been voluntary, and the penalties have been enforced under the supervision and by members of the association. The preamble adopted by the association in this case shows the ostensible purpose of its formation. * * * In other words, we think that the rules adopted do not contradict the expressed purpose of the preamble, and that the result naturally to be expected from an enforcement of the rules would not directly, if at all, affect interstate trade, or commerce. * * * This association does not meddle with prices and itself does no business. In refusing to recognize any yard trader who is not a member of the exchange, we see no purpose of thereby affecting or in any manner restraining interstate commerce, which, if affected at all, can only be in a very indirect and remote manner. * * *
>
> The design of the defendants evidently is to bring all the yard traders into the association as members, so that they may become subject to jurisdiction and be compelled by its rules and regulations to transact business in the honest and straightforward manner provided for by them. * * * And if, for the purpose of com-

pelling this membership, the association, refuse business relations with those commission merchants who insist upon buying from or selling to yard traders who are not members of the association, we see nothing that can be said to affect the trade or commerce in question other than in the most roundabout and indirect manner. * * *

If, for the purpose of enlarging the membership of the exchange, and of thus procuring the transaction of their business upon a proper and fair basis by all who are engaged therein, the defendants refuse to do business with those commission men who sell to or purchase from yard traders who are not members of the exchange, the possible effect of such a course of conduct upon interstate commerce is quite remote, not intended and too small to be taken into account. * * *

A claim that such refusal may thereby lessen the number of active traders on the market, and thus possibly reduce the demand for and the prices of the cattle there set up for sale, and so affect interstate trade, is entirely too remote and fanciful to be accepted as valid. * * *

The rules are evidently of a character to enforce the purpose and object of the exchange as set forth in the preamble, and we think that for such purpose they are reasonable and fair. They can possibly affect interstate trade or commerce in but a remote way, and are not void as violations of the act of Congress."

The principle thus established in the *Anderson* case would seem to be conclusive on this appeal. For in most respects the two cases are similar. Each presented the question, whether a rule of an exchange was a restraint of trade under the Sherman Act. In each case, the rule, if at all restrictive of trade, had another legitimate purpose—to promote the growth and welfare of the exchange. In each

case, to use the language of this court in the *Anderson* case, "a lessening of the amount of the trade is neither the necessary nor direct effect," and "there is not the slightest evidence that the market prices have been lowered."

In the *Anderson* case the lessening of the number of yard traders was held too remote an interference with trade to constitute a restraint thereof within the Sherman Act. This is equally true of the lessening of the hours of price-making in the case at bar.

In the *Anderson* case stress is laid upon the fact that other traders in Kansas City furnished a sufficient market. In the case at bar the absence of any restriction upon price making between 9:30 a. m. and 2 p. m. furnished sufficient opportunity to all desiring to purchase grain "to arrive."

In the *Anderson* case stress is laid upon the fact that the object of the rule was to enlarge the membership. In the case at bar, one object of the rule was to increase the participation of members in this trading "to arrive" and the volume of this trading upon the exchange, and to thereby make the privilege of membership a more valuable one.

Thus under the principle of the *Anderson* case this Call rule could have gone further than it did, and have required members of this association to trade in grain "to arrive," only with other members of the exchange, and thus have confined all this trading by its members to its exchange and within its regular trading hours.

The *Anderson* case also emphasizes a distinction in the application of the Sherman Act between a combination of persons existing for the maintenance

of a commercial exchange and a combination of persons not so associated. For in the *Anderson* case this court held that it was not a violation of the Sherman Act for members of an exchange to bind themselves not to trade with certain outsiders, while in

Eastern States Lumber Assn. v. *U. S.* 234 U. S. 600,

it was held that, while one dealer may refuse to deal with another for any reason appearing sufficient to him, if a number of dealers agree not to deal with outsiders, it is an undue restraint of trade.

Nor does the fact that this Call rule, in prescribing the maximum bid to the country after the call, required the final bid on the call to be reduced by the regular commission materially affect the question under discussion; for an exchange, having the right, as already seen, to confine all trading by its members to certain hours, and to thus limit the hours of any price-making by its members, may also fix the price, at which its members may buy *after those hours.*

So an exchange having, as the *Anderson* case decided, the right to require that its members shall trade only with other members, it may also prescribe that its members may trade with non-members only at a certain price or during certain hours. For the greater always includes the less.

Finally, it seems not inappropriate to recall here that this court, in rejecting the claim that the "pit" trading on this same exchange was illegal, said in

Board of Trade v. *Christie,* 198 U. S. 247,

> "that legislatures and courts generally have recognized that the natural evolutions of a complex society are to be touched only with a very cautious hand."

POINT IV.

THE DECREE REGULATES INTRA-STATE TRADING.

It will, of course, be conceded that this decree, if otherwise sustainable, should be confined to such of this buying "to arrive" as is interstate commerce.

This kind of trading "to arrive" is divisible as follows:

1. Where both the contracting members, including the principal (where either is acting merely as agent), reside in Illinois, and the grain involved is there located.

2. Where the person receiving and accepting the bid resides in, and the grain is shipped from a state other than Illinois.

Occasionally, the grain shipped is in Illinois, but the shipper resides in another state, or *vice versa*. But such cases are too exceptional to be considered.

The terms of these contracts do not require the party accepting the bid to—although he usually does—ship the grain in fulfillment of the contract from a particular place. He may acquire the grain in Chicago and there tender it to the bidder, or tender grain coming in from some point in Illinois, provided he does so within the shipping time mentioned in the contract, plus the time required for transportation from the residence of the seller to Chicago. (Rec., 111, 124, 125, 126, 133, 138.)

That the decree should not include the first of these classes of trading will, of course, be conceded. There is neither interstate transportation, nor an interstate sale.

Inasmuch, also, as the contracts in this trading "to arrive" do not *require* shipments of grain across state lines, even though in the practice much of such grain is so shipped, it would seem that under previous decisions of this court none of this trading "to arrive" is interstate commerce.

Ware & Leland v. *Mobile Co.*, 209 U. S. 405.
Engel v. *O'Malley*, 219 U. S. 128.

The *Ware & Leland* case involved the right of a state to tax brokers, who collected in Alabama orders for sales and purchases for future delivery to be forwarded to and be executed on the New York Cotton Exchange, and this court held the business not to be interstate—although it resulted in the making of contracts between persons who were citizens of different states—because the contracts entered into did not *compel* a shipment of grain across state lines, the court saying:

> "The appellants are brokers who take orders and transmit them to other states for the purchase and sale of grain or cotton upon speculation. * * * When the delivery was upon a contract of sale made by the broker, the seller was at liberty to acquire the cotton in the market where the delivery was required or elsewhere. He did not contract to ship it from one state to the place of delivery in another state. And though it is stipulated that shipments were made from Alabama to the foreign state in some instances, that was not because of any contractual obligation so to do. In neither class of contracts for sale or purchase was there necessarily any movement of commodities in interstate traffic, because of the contracts made by the brokers. * * *
>
> The delivery, when one was made, was not because of any contract obliging an interstate

> shipment, and the fact that the purchaser might thereafter transmit the subject-matter of purchase by means of interstate carriage did not make the contracts as made and executed the subjects of interstate commerce."

In *Engel* v. *O'Malley, supra,* the business of making deposits of money with a banker, with a view to its safekeeping and transmission to other states was held not to be an interstate business, because it did not contemplate the receipt of bailments for the transmission of the identical objects received to other states, and that for this reason the case was in principle similar to the *Ware & Leland* case.

A sale is not an interstate one merely because the contracting parties reside in different states; nor are sales interstate in character merely because they give rise to interstate transportation. The transportation may be interstate and the transaction of sale still be intra-state in character. To make the transaction of sale interstate, the parties should contemplate, and their contract should require, the shipment of property from one state to another. The terms of the trading under this Call rule did not do this.

Hence this decree is reversible *in toto.*

Furthermore, if the decree be held to properly cover any of this trading, it is too broad in that its terms include trading between residents of Illinois for grain located in that state. While the first paragraph of the decretal part of the decree is confined to interstate commerce, clauses (a), (b) and (c) of the decree (Rec., 166) make no such restriction, but are general and include sales by residents of Illinois to

other residents of Illinois of grain located in Illinois.

For this reason the decree, if it is to be sustained, should be modified in this respect.

POINT V.

IT WAS ERROR TO STRIKE OUT PARAGRAPH SIX OF ANSWER.

This paragraph contained the following allegations:

> "That defendants aver that some years before the adoption of said rule, four or five persons engaged extensively in purchasing grain to arrive in Chicago—and who were also members of said Board of Trade—also severally acquired by leases from the railroad companies whose lines terminated in Chicago, or otherwise, control of practically all the grain elevators in Chicago which were used as public (Class "A") warehouses, and were conveniently located as respects rail and lake transportation, and they have since severally operated the same as such warehouses, and have also themselves built and thereafter operated other like grain elevators, they thus together controlling practically all such public grain elevators or warehouses in Chicago, and each of them combining with his business of public elevator proprietor that of grain buyer; and each such proprietor used his said elevators for the storage of grain purchased and owned by himself. That this ownership by said grain dealers of said public elevators enabled them to drive out of such business other grain buyers, which they did by overbidding such other purchasers of grain and thus in effect giving away a portion of their storage charges, and that by reason of this and other advantages which said warehousemen had by reason of their operating such

warehouses, said warehousemen were able to, and did, acquire a practical monopoly of the business of purchasing and selling grain to arrive in Chicago, and they were thereby enabled to crush out, and they had prior to the adoption of said rule in part succeeded in crushing out, competition among buyers of grain to arrive in Chicago, and that as a result said warehousemen had, prior to the adoption of said rule, been enabled to purchase and were purchasing, more than three-fourths of all the grain arriving in Chicago.

That in conjunction with said terminal elevators in Chicago said public warehousemen had, prior to the adoption of said rule, also acquired control of sundry smaller warehouses, adjacent to railroads at many country places within the principal grain producing states, and that by arrangement among themselves said warehousing business was so apportioned among them that each of them acquired and controlled exclusively the elevator system of one or more railroad lines or systems without interference therewith on the part of any of said others; and that it was also a part of such arrangement or understanding between said elevator owners that the one operating said warehouse system on any such railroad should be the only one of them to bid for grain 'to arrive' in Chicago over said road; and that it was also prior to the adoption of said rule, a frequent practice of said elevator proprietors to agree among themselves each afternoon upon the prices which all should adopt in their bids, to be sent that day to persons in the country for grain 'to arrive' in Chicago; and that by reason of the facts aforesaid many members of the Board of Trade—who would otherwise have joined in the bidding—ceased either to bid on said exchange for grain 'to arrive' in Chicago or to send out bids therefor to the persons in the country and ceased to solicit or accept from country shippers consignments

of grain to be sold 'to arrive' in Chicago; and that competition in bidding for grain 'to arrive' in Chicago had, prior to the passage of this rule, become very much restricted.

Defendants aver that the only purpose or intention of said Board of Trade and its members in adopting and of its officers and directors in enforcing said rule—other than that of promoting the convenience of its members by restricting their hours of business—was to increase competition among those engaged in buying and selling grain 'to arrive' in Chicago by enlarging the number of members of said Board who would participate in such bidding for grain 'to arrive' not only upon said exchange and among the members of said Board of Trade, but also the number of those who would send out bids to the country for grain 'to arrive.' "

The court struck out this paragraph because none of "the facts alleged in said paragraph, whether considered by themselves or in conjunction with other alleged facts in said answer, constitute a defense to said bill."

All the conditions existing at the time of the enactment of this rule should be taken into consideration. (See cases cited on p. 13 of this brief.)

The unhealthy trade conditions set up in this paragraph have been proven in cases before the Supreme Court of Illinois, in which the Attorney General secured injunctions to prevent public warehousemen at Chicago from mixing their own grain in their public elevators with that of their depositors.

Central Elevator Co. v. *People*, 174 Ill. 203.
Hannah v. *People*, 198 Ill. 77.

In the former case the court said:

"The evidence shows that defendants, as pub-

> lic warehousemen storing grain in their own warehouses, are enabled to, and do, overbid legitimate grain dealers by exacting from them the established rate for storage while they give up a part of the storage charges when they buy or sell for themselves. By this practice of buying and selling through their own elevators the position of equality between them and the public whom they are bound to serve is destroyed, and by the advantage of their position they are enabled to crush out, and have nearly crushed out, competition in the largest grain market of the world. The result is, that the warehousemen own three-fourths of all the grain stored in the public warehouses of Chicago, and upon some of the railroads the only buyers of grain are the warehousemen on that line. * * * In this way they use their business as warehousemen to drive out competition with them as buyers."

Appellants expected by evidence in support of this paragraph, to show that, despite these decisions of the Illinois Court, this unhealthy trade condition existed at the time of the enactment of the rule, and that a desire to eliminate this feature of the trading was one of the purposes of enacting this rule. The trial court, however, not only expunged these allegations as immaterial, but excluded the evidence tending to prove them.

And why was it not proper to do so? It would have tended to disprove the charge of the Government that the purpose of the rule was to restrain trade, and would have helped to support the claim of appellants that this rule was enacted in the proper exercise of a legitimate function of the exchange—the improvement of trade conditions.

Surely the exchange's right to proceed in this di-

rection is not limited to acts, which are not violative of law. The fact that a state may be vested with power by civil suit or criminal action to abate an unhealthy trade condition, is no reason why a commercial exchange, within its limited sphere and through the exercise of its disciplinary power over its members, should not be permitted to aid in bringing about a healthy trade condition.

Why should an exchange suffer from inadequate state laws or the lax enforcement of laws?

Why may it not supplement the efforts of the state to suppress monopoly?

POINT VI.

THE DECREE IS TOO BROAD.

This is true as respects appellants, and more so as respects the members of the Board.

In suits to enforce the Sherman Act this court has held that the Government must be confined to specific violations, and that a decree for the Government should not contain general prohibitions, which are tantamount to enjoining defendants from in any way violating the Sherman Act.

Swift v. *United States*, 196 U. S. 375, 401.

Clauses (b) and (c) of the decree (Rec., 166) plainly violate this principle; for in addition to enjoining the enactment or enforcement of, any similar rule paragraph (b) enjoins not only the Board of Trade, but all its members from "agreeing or acting together, or with one another, expressly, or impliedly, directly or indirectly, for the purpose or

with the effect of fixing or maintaining a price on the articles, corn, oats, wheat or rye, for any specified time or times." Clause (c) is open to the same objection.

While these provisions of the decree do not seriously embarrass the appellant Board of Trade, as it does not engage in any business whatever, they may embarrass its members.

It is, therefore, suggested that this decree, if it is to stand, should be confined to enjoining the enforcement of or compliance with, the Call rule in question, or any other similar rule or method.

Respectfully submitted,

HENRY S. ROBBINS,
Counsel for Appellants.

APPENDIX.

Testimony as to the purpose and effect of the Call Rule.

GEORGE R. NICHOLS testified (rec. p. 107):

"I had something to do with the formulation of this Call rule. I was chairman of the Committee that got the rule up, and explained it to the members, and caused its adoption. The trade conditions which led up to the adoption of this rule were, that there seemed to be a concentration of the handling of cash grain in and out of Chicago in a few hands. * * * I was approached with the idea that there might be something wrong in our rules, and suggested that I be able to suggest a remedy. I found that the difficulty of distributing a responsibility for conditions was somewhat mixed. It arose largely, in my personal opinion, from neglect of the enforcement of our closing rule as to when members of the Board of Trade should make prices. We had a rule that at 1:15 all making of prices would cease on the commodities dealt in on the exchange; that rule had been neglected for years, and a system had grown up whereby more or less trading was done outside of the regular trading hours, those trading hours having been arrived at after years of experience. And the Call rule was devised so as to possibly extend the hours of trading in the afternoon to the satisfaction of everybody without curtailing the trade any. * * * I have nothing to add to my answer except to emphasize what I have said that the intent of the rule

was to improve trade conditions, to widen the market, both as to volume and to attract more buyers and sellers."

Mr. MERRILL, Secretary of the Board of Trade, testified as follows (rec. p. 98):

"Prior to the enactment of the rule, the conditions were such that the grain arriving at Chicago was being received by a fewer number of persons or firms than it was afterwards, when the rule was put into effect. The object of the rule, in a large way, as I understand it, and have always understood it, * * * was to increase public market bidding, increase competition, and facilitate doing business openly in the open market; and second, to give us reasonable hours of closure in which to finish up our office work, do our banking, get out our mail, and get away from our business."

W. N. ECKHARDT, a member, testified (rec. p. 111):

"I was one of the original committee which was asked to formulate the Call rule, and worked therefor. The rule did pass and after the enactment I served as chairman of the committee for a number of years. * * * The number of concerns handling this grain from the West either on consignment or to arrive had dwindled to a few in number. The business was small. * * * That is the prime condition which promoted the enactment of the rule."

J. P. GRIFFIN, President of the Board of Trade, testified (rec. p. 142):

"I took part in the formulation of this rule, and the securing of its adoption. I was chairman of the committee which brought the Call rule into life. * * * A great deal of dissatisfaction had arisen over conditions in several quarters, notably among the smaller merchants on the Board of Trade, and among the country elevators, Farmers' Cooperative Elevators, and kindred concerns interested in buying grain from the farmers and shipping the grain to this market. The complaint that was made finally was that the market was becoming virtually a closed market; the tendency was toward concentration of business in the hands of comparatively few. The smaller merchants on the Board rebelled; they claimed they were being driven out of business, that they were denied equality of opportunity to engage in that business. * * * The directors received the communication from the members, and it resulted in the President appointing a committee of seven, who were instructed to go into this question very thoroughly, thresh it out from every angle, and report back. * * * The volume of business that was being done in the open market of this character that is under discussion, had dwindled down to small proportions, in so far as the trade colectively was concerned. * * *

The first cure * * * that was virtually agreed upon, was to enforce the closing rule, which had not been literally enforced in regard to this particular branch of the business for a good many years. That rule in substance provided that all transactions in

commodities for future delivery should be confined to the hours of 9:30 to 1:15 except on Saturday, when the hours were 9:30 to 12. The theory of the Committee * * * was that even though there were situations which might give preferential advantages to certain interests, if they were forced to do their business in the open market, subject to daylight, subject to the open competition of all persons engaged in business on the Board of Trade, while they might be the recipient of some advantages, they could not use them to suppress or drive out competition. That was the underlying thought at that time. However, a good deal of consideration was given to the fact that this custom of trading in this character of grain outside of hours had grown to a point where there was more or less demand on the part, first, of the countryman, the country grain dealer, producer and shipper; and also on the part of the shipping interests into this market, who frequently secured their sales that way. The result was that instead of following the first plan that had been agreed upon, as a second plan this Call rule was adopted. In the Call rule we aimed—and it was the intention and object of the framers of the Rule, that so far as practical, to force the trading in grain to arrive into the open market during the hours of regular trading, when all the members of the Board of Trade were present, and could participate in the trading, if they wished. Coincident with the Call Rule, * * * the closing rule of the Board was also amended, that the member trading in or under the operation of the Call rule would not be subjected to discipline."

CALEB H. CANBY, a former President of the Board of Trade, testified (rec. p. 22):

"It is the intention of this rule to provide for a public competitive market for the articles dealt in."

RESPECTING THE EFFECT OF THE RULE.

EDWARD G. DUNN, who was not a member of the Board of Trade, but at one time a candidate for Governor of Iowa, and a grain dealer at Mason City, Iowa, testified (rec. pp. 117-122):

"From the time I entered the business in 1903, up to the time the Call rule was established, we got no bids,—at least my company did not. After the Call was established, the different commission houses, with whom we did business here in Chicago, sent out bids nearly every day. * * * Before the rule was established the only thing we had to guide us would be what we country men call the 'speculative market.' * * * The company I was interested in, while I was the heaviest stockholder, was composed of about one hundred farmers, and they would usually telephone in if they were at all interested, and ask us what the market was, and we would tell them what was the bid to arrive price at Chicago. * * * While I was actively connected with the business, I usually knew by 2:30 what the Call bid was, and we used that as a basis, largely, to buy for the next day. This knowledge enabled us to buy on what you might call a steadier margin of profit. * * * The average price to the farmer was higher under the Call rule than before. * * * My opinion is that the effect of the Call rule was

beneficial, that the farmer got a higher price for his grain. It could be handled on a less margin of profit than it was when we had to speculate on it. My corporation is what is known as a farmer elevator company. * * * They are corporations organized under our state law by which the farmers handle their own products. The stock of the corporation is owned and controlled by the farmers of the community. * * * Before the Call rule we experienced a great deal of difficulty in carrying on that business, especially in the earlier days of my experience, when we found ourselves the victims of what I call unfair competition. Some people would not deal with us. * * *

It might all be summed up, so far as we people in the country were concerned, as dealers and farmers, in this answer. That prior to the Call rule we were the subjects of rather intermittent and unfair competition. * * *

Unless you were able to get the bids of certain firms here who were large buyers of grain, you were at a distinct disadvantage before the Call rule was established. After its establishment that disadvantage disappeared and we were on an equal basis with the same chances that the other fellow had. I can only speak of Northern Iowa; * * * we have about 375 such companies, corporations organized for the profitable marketing of their crops in as many different towns. They run from 100 to as many as 400 farmers in each company. * * * The farmers largely market their crops through these companies. For a couple of years I was Secretary of the organization in Iowa, and I had in that organization about 65,000 farmers belonging to from

330 to 340 companies at that time. * * * In other words, whenever we organized such a company the competition usually attempted to run us out of business; and they succeeded sometimes and made it very hard, until the Call rule was established. * * * By reason of this Call rule we bought on a closer margin. I would not say a higher price. * * * We had our commission houses offering and selling on the Call. * * * Before the Call we consigned to them. We could not sell them anything. We did not receive bids from them prior to the Call rule. * * * We had to ship our grain in, and it used to take nine or ten days for it to arrive here and be sold by sample. * * * Prior to the Call traders in Chicago never offered me anything in the three years that I was in business. Prior to the institution of the Call I was never able to get a bid out of Chicago. I had to ship it in, consign it in here, and have it sold on sample tables on the Board of Trade. * * * If you will permit me to explain that,—not only that, but I have shipped grain down here to Chicago and went up and tried to sell it when it was here on track to those men and they would not buy it from me. * * * I guess they had me on the black list because I was a farmers company. * * *

The big line elevator men of our state, a large number of whom were Chicago operators, had formed an organization in our state, by which out of an office in Des Moines they fixed the price down in the state. It was to get away from that condition that we people formed a local company and bought an elevator of our own."

GEORGE HUBBARD, a grain buyer and shipper of Mt. Pulaski, Illinois, testified (rec. pp. 123, 125) that in addition to the regular grades of grain, which were necessary in future contracts, there were what is known as commercial grades, and that "prior to the establishment of the Call rule, there was no means of knowing what commercial grades were worth during the balance of the afternoon;" and further testified as follows:

"The adoption of the Call rule and establishing those prices, the closing price, established a market for those several grades of grain that we could sell or accept any time up until a certain time the next day, 9:15 or 9:30 as a rule. It to me, in conducting my business, seemed quite an advantage; it established a market for our commercial grades of grain for practically the twenty-four hours of the day; that is, any time during the business hours. * * * That is, the establishment of the Call price and the transmission of that information to me and others in the country enabled us who were buying from the farmers to know that afternoon what the bid price of that day was, instead of waiting until 9:30 the next morning. * * * The effect of this was to give us an assured market. * * * That being the case, I feel that that element of risk was removed and we possibly were enabled to handle our grain upon a little closer margin. That would result in a higher price to the farmer, and it gave us this advantage; that by selling our grain upon the call market, we could fill that sale from any road; while if we sold it direct to some buyer upon the Illinois Central—that is, where I am located—we would be

compelled or required to fill our sale by grain originating on that road, and that at some times would be quite a disadvantage, in this way; * * * I would buy some corn for thirty days from the farmer and sell it to be delivered to Chicago for thirty days' shipment. The roads might break up, the weather be bad, and our farmers would be unable to deliver that corn to us. We would be held to deliver that corn to the person who purchased it here. If the market was higher in all probability he would charge us something for giving us an extension of time. If the market was lower he would cancel our sale on us and we would be the losers; we would lose our sale, and we would still be bound to take the corn from the farmer and have our sale cancelled and have to sell the corn at a lower price perhaps when it came in. And under the Call rule, if we had that corn based on the price Chicago we could have the representatives whom we sold it through buy that corn for us here and deliver it. If the market was lower we would get the benefit of it, and if the market was higher we could sell it, fill our sale, and re-sell our corn. That was due to a more restrictive contract under the old system than under the call system. Prior to the Call rule in accepting bids on grain to arrive, the contracts contemplated shipment by particular railroads. They were invariably made on that basis. * * * Certain Chicago buyers on certain roads bought and handled grains on certain roads and other buyers did not buy on those roads or did not care to. * * * Under the Call rule we were able to buy on the call the grain arriving on other roads and deliver it on our contract. * * *

That being the case [a higher price in other mar-

kets] we could have our representatives in Chicago buy that corn on sample over here on 'change and fill our sale here, and we could divert our corn elsewhere, and take advantage of that advance, and that would give us an advantage to pay an additionl price for the other farmers' grain. This opportunity did not exist before the Call rule. * * * We had to supply it on that road. The establishment of the call increased the number of bids that we got out from Chicago for grain to arrive, both as respects the number of points reached by the bids, and in respect to the territory covered by our bids. We received more bids in our towns from the Chicago market after the Call rule than we did before. * * * In our territory the Chicago buyers would not obtain these grains unless they had bid above competitors from these other markets."

J. A. Henebry, the manager of one of these farmer elevators, having about 340 farmers among his stockholders, testified (rec. 126):

"Before the Call prices came into effect it was more difficult to arrive at a price to pay the farmer than it was after the Call came into effect. The bids were so uncertain and they were not as reliable as the call price, or the call bid. Under the Call rule we ascertained the price earlier than we did under the old bidding system; * * * so that we knew in the afternoon the prices of our commercial grades under the Call system, whereas we would not know until the next morning, if at all, under the old system. * * * I believe we received more bids under the Call than we did otherwise. To a large extent the contracts used under the old system were

confined to arrivals upon a particular railroad, whereas the contracts under the Call system contemplated grain arriving upon any railroad that came to Chicago. * * * That had an advantage to men in our business. * * *

What I said a few minutes ago that I had more bids, I meant bids from more persons. We had difficulty in getting our bids before the Call rule. * * * We had to seek them, and in seeking them we were turned down in a good many cases. After the Call rule we could get them more readily than we could before the Call went into effect." * * *

We got bids during the session as well as after the session, and the bids during the session differed from the bids after the session oftentimes."

WILLIAM J. RAY, Secretary of the Farmers Grain Dealers Association of Iowa, and the manager of a farmers elevator having 160 farmers, as stockholders, testified (rec. 129):

"Under the Call rule I acquired a knowledge of the price in the afternoon; this I did not acquire before the Call rule and this enabled me to buy grain upon a smaller margin with a consequent better price to the farmer than prior to the Call rule."

The foregoing witnesses were not members of the Chicago Board of Trade.

Members of the Board of Trade also testified as to the effect of the rule as follows:

MR. GRIFFEN, the President (rec. p. 144):

"The first and most important effect in my opinion of the Call rule was that it * * * forced the

business into the open market. The second, and to my mind equally important, effect of the rule was that it scattered the business; * * * that it increased the number of persons engaged in that activity, and increased proportionately the business of those who had formerly been engaged in it. By persons engaged in the business, I mean both buyers and sellers of grain. * * *

As a general conclusion, I would say that it narrowed the margin of profit, and had the tendency to perhaps increase moderately the prices netted the producer, without increasing the cost to the consumer. * * *

The effect of the Call on competition, in my judgment, was that it increased competition in the buying and selling of grain to arrive."

Mr. MERRILL, Secretary of the Board of Trade, testified (rec. p. 98):

"The effect of this rule was that it facilitated buying on the part of my firm by reason of the grain being sold on the exchange during exchange hours. Our business was buying and filling orders placed with us by millers and jobbers in the east; and we bought our grain on the exchange, in our practice bidding the country for it; and the effect of this rule was to bring more grain onto the open market of the Board of Trade where we could get at it and buy it. After the rule we had more people to buy from than we did before. More people were offering us grain of the kind and character we wished to ship east to millers.

The Court: How did that result come about?

A. It was accomplished, as I understand the logic and reasoning of it, by bringing more grain, under free and open competition of a large number, and a larger number having it to sell. My understanding would be that it did that by reason of the larger number being enabled thereby to buy grain in the country. Prior to the enactment of the rule, the conditions were such that the grain arriving at Chicago was being received by a fewer number of persons or firms than it was afterwards, when the rule went into effect."

Mr. MARCY, of the Armour Grain Company, testified (rec. p. 95):

"In my judgment the Call did not in any way affect the volume of the grain that came to Chicago. * * *

I am familiar with dealings in grain to arrive prior to the passage of this rule, and also after the rule was passed. It is rather a hard question to say whether the passage of this rule had any effect, and if so, how much, in increasing or decreasing the dealing in grain to arrive between the hours of the close of the Board on one day and the opening of the Board on the following day. * * * Our company was a substantial dealer in grain to arrive. Our own experience was that we bought just as much grain to arrive in Chicago. The rule did not interfere with that. It may at times have interfered with us buying the grain after the close of 'change up to the time that 'change opened, and threw the business to be transacted during 'change hours instead of after 'change hours. My opinion would be that it stopped

a large volume of this business, from being transacted between 'change hours, and held it over until the opening of 'change the following day. * * *

The adoption of the rule changed no condition whatever in the market with the exception that it postponed a lot of buying in the country after the close of 'change until during 'change hours, and threw those trades all in during the open market."

Mr. STREAM, another large dealer of grain to arrive, testified, (rec., p. 99):

"The conditions which operated in our minds in fixing the price became fixed at the close of the market each day. We bid the Call price when we thought conditions warranted that price. It is almost universally true that those conditions became fixed for the day before the close of the Call. I mean by conditions, the conditions which induced us and others like us to fix the price that we would bid to the country. The time that the farmer or the shipper received his bid was not in any way changed by the Call rule. * * * We did most of our bidding during the session by telegraph and over the telephone."

CHARLES B. PIERCE, a member of a large grain buying firm, testified (rec., p. 101):

"I did not notice any marked falling off in our business after the Call was established, from what it was before, and I did not notice any effect upon the prices in our buying and selling."

JAMES A. PATTEN, the largest individual grain dealer in the Chicago market, testified (rec. p. 105):

"I do not think that the suspension of price making in bidding to the country for grain to arrive between two P. M. one day and nine thirty the next morning materially affected prices. * * *

There are wider conditions than that. That is just a mere incident. * * * The Call rule did not, in my judgment, affect prices. * * * Most of the business is done during the hours of session."

GEORGE R. NICHOLS, a member of the Board, testified (rec. p. 107):

"I observed the operation of this rule after it went into effect. * * * It increased the number of buyers and sellers in the market to a degree that you would have to use the word 'multiply.' At one time it was almost impossible to buy grain, which you might call fresh arrivals of grain, freely in our market. After the passage of the rule you could buy or sell with the greatest ease. Both buyers and sellers appeared, and to such an extent that we were obliged to install additional table room to accommodate the samples. * * * The number of persons who had samples on these tables increased very largely. * * * That would indicate that the effect of the rule was to increase the number of buyers, the number of sellers, and to open wide competition in bringing grain into an open competitive market for sale where the whole world would know what the transaction was. * * * The attend-

ance of buyers and the attendance of sellers tend to improve market conditions.

The Court: You base that opinion on your own observation and experience?

A. That is my experience as a merchant. * * * The rule immensely improved the condition of the average member of the Board of Trade engaged in that line of business. * * * The adoption of this rule had the general effect of drawing grain both in and out for the public competitive market during trading hours; taking it out from the candle light and into the sunlight."

MR. ECKHART, another large dealer in grain to arrive, explained that one advantage of the Call rule was that grain arriving by any railroad running to Chicago could be delivered upon a contract made upon the Call, and that if the grain ordinarily contemplated could be more profitably delivered in other markets, other grain could be substituted for it, which was not the case before the Call rule was adopted (rec. p. 111); and further testified as follows:

"To find out what grain to arrive was worth prior to the enactment of the rule it was necessary to use your friendship to a great extent, and to work in devious ways to find out what the bidding was. Very often with strenuous efforts you could not find out what the bids were until the next morning, when you might find out from some disinterested member in the country or the buyers from other markets, what the bids were. So that the volume of business which came generally on the market was rather small,

and the large number of people who were interested in the Western trade were at a disadvantage. The Call rule changed that condition because the competition was in the open market, the people came to the Call and made their bids. * * * That information was also obtainable by the farmer who was selling, and the country shippers. * * * The risk of the country shipper was very largely lessened because he knew what he could get the next morning at 9:30 * * * and he could make his arrangements with specific knowledge of what he could get at the primary market. Before the rule nobody knew what the market would be until the next morning. * * * It is my understanding that before the Call rule the commission men would be buying from the farmers up to until three and possibly four o'clock in the afternoon, without the knowledge of the Chicago price on grain to arrive. After the rule he would be buying and the farmer selling with full knowledge of the price in Chicago on grain to arrive, during the Call after two o'clock. * * *

After the adoption of this rule, the after effect was that the number of concerns who were interested, as we were, in receiving grain and influencing grain from the West into Chicago, handled considerably more business. There were also additions to the number of concerns who did this business, not very large, perhaps, but there were additions to the number who competed for the business. * * * It largely increased the volume of business which we were able to handle profitably."

JOHN E. BRENNAN, a member of the Board of Trade, doing a commission business mainly for farmers' co-operative companies, testified (p. 130):

"I found prior to the Call rule going into effect, that it was very hard to get satisfactory bids on grain to arrive. The market was very narrow. In fact there were but few firms who would give bids, and at times they did not care to give bids. Very often in the afternoon my clients would wire me and ask me what I could get for a certain grade of corn or oats to arrive. I would get in touch with different firms over the telephone, and sometimes I would not even get a bid. They would tell me that they did not care to bid, while they were bidding direct in the country to other shippers; and it placed my country shippers who were farmers co-operative companies, under a disadvantage to some of the independent buyers. But after the call rule went into effect I found I could always get a bid on grain to arrive very readily. * * * Before that rule was adopted, my country clients were often obliged to sell for future delivery, when they could not get a satisfactory bid in grain to arrive. * * * They were handling say a grade of No. 3 or 4 corn, or oats, and were obliged to go in and sell contract grades as a hedge or protection against their purchases from the farmers. Very often the article would remain firm or worked higher, while the poorer grades worked lower, and instead of being a protection or a hedge, it turned out to be just the reverse and showed a loss before they were through. Now, with this Call, when this call was in effect, you could sell anything bought from the farmer, from a

sample grade or eating corn, up to the best corn that grew. There was a market for it throughout the country. * * * What a man bought he knew he could sell; and in that way he bid with a closer margin because his margin of profit was assured. * * * The effect of the establishment of the call rule upon my business was to increase it materially. My business in selling grain to arrive increased materially."

LOWELL HOIT, another member of the Board of Trade doing a commission business, almost entirely for the farmers elevator companies, in referring to the Call rule, testified (rec. p. 132):

"So far as I know, this was the first definite attempt by the Chicago Board of Trade to establish a market which would in any definite way carry to every dealer in every locality, every business day of the year, the price on every commodity that he dealt in. I think that this rule provided for the taking care of that situation. There had been times when I would get a better bid on the Board of Trade in the afternoon on a certain line of railroad, but possibly wished it on all railroads; and having 700 shippers in five different states, it was a distinct handicap not to be able to get bids except on certain roads. But when this Call was initiated, it had the effect of broadening the market; of bringing more buyers and sellers together. * * * The effect was that those buyers and sellers, the consumer and producer, were seemingly brought into closer relationship; and quite often the amount of business done on the Call ran into a very large sum. * * * The Call

is the only instrumentality whereby he might obtain the value of his grain during the full seasons; and our company for the seven years that the Call was in operation, did not fail over three times during that time in sending to every shipper that we had the Call bid, in order that he might take advantage of it, if he chose. * * * There were a great many advantages which accrued to the shipper by virtue of his sales on the Call, that might not, and probably did not, maintain prior to the Call. For instance, a man selling grain to arrive in Chicago "Track Chicago," had the privilege of delivering over any road; and our bids always stated that the low grades should be taken at market discount. * * * Upon the adoption of the call rule the number of buyers not only increased, but the volume of business necessarily increased, for the reason that there are people in the country, located on what we designate as cross-lines * * * over which grain could very readily go to other cities. We have found that those people did not regularly receive bids; had they been located on certain lines or railroad, they might have received bids regularly prior to the call; but after the call the bids from Chicago for "track Chicago," included all of the dealers which heretofore did not have the opportunity of getting to Chicago. * * *

It increased the number of people who shipped to Chicago; increased the number of places reached by those bids, and increased the number of shippers to Chicago. * * * We participated very materially in this increased volume of business by reason of the Call rule. This immediately followed that rule."

GARDINER B. VAN NESS, a member of the Board, whose business was in part that of bidding for grain to arrive, testified (rec. p. 133):

"The Call rule materially increased my business of that character. The effect of the Call was to increase the number of people engaged in the business and increased the activity of those who had previously engaged in it. It increased the volume of that business. As respects the advantages or disadvantages of the adoption of that rule, the market for cash grain was very restricted, it was becoming more and more so all the time. A few concerns seemed to be dominating the business on certain lines of railroad. The result was that the adoption of the rule brought order and intelligence into the business. It was conducted along more intelligent lines. It brought new customers in; gave people an opportunity to get together, buyers and sellers; * * * and in that way they could register their idea of the value, and the bids they made there registered the various ideas of the value of grain at different times of shipment. * * * It put the trade in the commercial grades, instead of being confined to the contract or higher grades. It fixed a more definite market, and well known prices on the commercial grades, than theretofore. It brought order into the trade, and order and intelligence eliminate risk. We knew just what the value of the grain was that was registered as the action of all these people coming together. We knew from that just what we could bid, and we knew what we could get for it. * * * It brought all the minds of the trade together, so that a man could offer

it in the east, knowing what he could buy the grain at; and it brought the grain right out in the open market, where it was not before. * * * There was a class of men whose business it was to offer grain to the East to milling points and export points. This rule brought them into the market, when it brought the grain from the West into the open. Where it was not monopolized by a comparative few, it gave them an opportunity to obtain supplies, and it broadened the market very materially. Those who shipped to the East were brought to bid for grain to arrive. * * * They had an accurate knowledge of the value, they did not have to guess at it. If a person knows what the stuff is worth, they can offer it at that basis; but if they have to guess at it they will take a wider margin of profit to cover any possible mistakes. * * *

There was increased activity in trading in grain to arrive during market hours. * * * The rule forced more of this trading in grain to arrive into the regular market hours."

HIRAM SAGER, a former president of the Board of Trade, whose business was that of selling grain for western shippers on the Chicago market, testified (rec. p. 136):

"As I observed conditions prior to the adoption of the call, and as I found it, my experience in selling grain for western shippers, the market was gradually becoming more and more narrow and restricted. * * * My observation was that our opportunity to sell after the adoption of the Call rule was very greatly improved, and it was

unquestionable that after the adoption of the Call rule the receipts of grain coming to this market were very much more widely distributed among a great many receivers and commission merchants representing country shippers than had been the case before. My opinion is that it broadened the market and increased the number of both buyers and sellers, and it acted to the advantage of the Western shipper. I think it mostly increased competition. I think it threw both the buyers and sellers into more direct competition because on the Call we all gathered together and there was a free interchange of bids and offers that were open and known to the entire trade at the time they were being made, so that instead of purchases or sales being largely a matter of quiet personal negotiation between one buyer and one seller, this was an open market where both buyers and sellers were compelled to make their bids public and open, and in that way increased the competition among both buyers and sellers."

RALPH A. SHUSTER, a member of the Board of Trade engaged in the business of shipping grain East, testified (rec. p. 137):

"The Call was beneficial to us, in that it enabled us to make contracts East that we would not have made, and did not make prior to the establishment of this rule. This was because it gave me an idea and a basis on which to figure my Eastern clientele. I knew that if I bought grain on the basis of the Call that I would get exactly what I bought, I would not be obliged to take any off grade corn, we will say, that was tendered to me

on contracts. * * * If we bid to the country for grain to arrive I would be obliged to take anything that was tendered on the contract and which would not fit my eastern contract. In bidding to the country for grain to arrive, the bids are sent to more than one point. The quantity is not limited when we bid to the country; we would not know how much we were going to get. In buying grain on the Call we would know the exact quantity as well as the exact grade. It is my judgment that it enabled me to work on closer margin East because I would not be obliged to take those off grades that I just referred to. * * * I think the fact that the Call enabled me to ascertain more accurately the price in the West enabled me also to work on a closer margin. The effect of the Call was to give a larger and broader market. I believe that our business was increased by the institution of this Call. It had the effect of increasing the number of people participating in the buying and selling to arrive. * * * Before the Call system he was restricted to one particular line, if the buyer wanted to be technical. It enabled the buyer to frequently penalize the seller in excess of the current market."

William H. Merritt, a member of the Board of Trade, who was also engaged in the business of shipping grain East, testified (rec. p. 140):

"It was an advantage to us to be able to buy on the Call the commercial grades and be assured of getting the commercial grades because we had contracts with responsible members of the Board. It enabled us to make closer prices east, to know the

price that we could buy it at. I think the rule brought in a great many more people into the offering grain to arrive. Previous to that time more of the business was handled by the elevator people who would go out at any old price, and it was hard to determine the real cash value of the grain. * * * The number of people exposing samples on the table was very much increased, offhand I should say from fifty to seventy-five per cent.

The Call rule imposed no restriction upon the price we could offer east. We could offer whatever price we wanted to."

CHARLES F. SCHNEIDER, a member of the Board of Trade, whose business was shipping grain East, testified (rec. p. 141):

"The effect of the Call on my business was to increase its volume very materially. It enabled me to buy my grain to better advantage because I could buy the particular grades that I wanted, and it enabled me to make closer prices and work on a smaller margin of profit. I think the Call advanced prices in the Chicago markets. Our business was transacted on a smaller margin of profit. * * * The Call had the effect of increasing prices. I mean that a shipper could pay a higher price for grain for the reason that his risk was less and he could do business on a smaller margin of profit. I think it was so during the life of this rule. * * * I can only answer in a general way. I think the business was done on a smaller margin of profit. * * * My judgment is that this rule added to the price and value of the grains coming through here dur-

ing that time possibly more than half a cent a bushel. The smaller margin of profit, raising of prices to the seller, resulted from the smaller margin of profit taken by the middleman, less risk involved. It did not raise the prices to the consumer. * * *

I know that after the rule was passed I bought a great deal more grain from these dealers than I did before. * * *

All grain bought to go East is bought through commission men. That is a large branch of the business of marketing crops through the Chicago Board of Trade."

Office Supreme Court, U. S.
JAN 26 1918
JAMES D. MAHER,
CLERK.

No. 98.

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1916.

BOARD OF TRADE OF THE CITY OF CHICAGO, et al., *Appellants,*

vs.

UNITED STATES OF AMERICA, *Appellee.*

Appeal from United States District Court, Northern District of Illinois.

APPELLANTS' SUGGESTIONS AS TO WHETHER QUESTION HAS BECOME MOOT.

MR. HENRY S. ROBBINS,
FOR APPELLANTS.

BARNARD & MILLER PRINT, CHICAGO

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1916.

BOARD OF TRADE OF THE CITY OF CHICAGO, et al., *Appellants,* vs. UNITED STATES OF AMERICA, *Appellee.*	Appeal from United States District Court, Northern District of Illinois.

SUGGESTIONS FOR APPELLANT IN REPLY TO THE COURT'S INQUIRY, WHETHER THE QUESTIONS ON THIS APPEAL HAVE BECOME MOOT.

STATEMENT.

The bill in this case was not filed merely to set aside a rule of appellant then in force. It prayed, also, that appellee might "be perpetually enjoined from entering into *any* combination or agreement fixing the bids which may be offered to dealers between the regular sessions of said Board of Trade for wheat, corn, oats and rye to arrive," and the decree for appellee was as broad as the prayer; for in addition to annulling the existing "Call" rule, it also enjoined appellant "from enforcing, acting upon, or hereafter adopting, *any similar* rule * * * for the purpose, or with the effect, of fixing or main-

taining a price on the articles corn, oats, wheat or rye, for any specified time or times," and "from enforcing, acting upon, or hereafter adopting, *any* rule * * * to the effect that members of said Board of Trade of the City of Chicago shall fix the offers or bids which may be made to dealers in the articles corn, oats, wheat or rye, to arrive, which said offers or bids are to be made between regular sessions of the Board of Trade of the City of Chicago."

Some months after the case was at issue (Rec., 126), for reasons not apparent on the record, but doubtless either because of the unwillingness of members to maintain an attitude which the Attorney General of the United States had deliberately declared to be illegal, or because this attitude of the Attorney General in a measure defeated the beneficent purpose of the rule by creating a fear among members that they might be individually prosecuted criminally under the Sherman Act, if they participated in such call,"—the then existing rule was repealed, and in lieu thereof—as shown by the record (Rec., 90, 143) —a new regulation was adopted, which still is in force.

This regulation was adopted under the same charter power of appellant as the former rule. It is less drastic than the former rule, and also less beneficial to the grain trade, because it does not enable the farmers and country buyers to know that afternoon the Chicago price for grain "to arrive," as did the former rule.

While the existence of such second rule appears in the record, it was not introduced in evidence. For

the information of the court, however, we venture to print it at the end of these suggestions.

When the form of the decree was under consideration in the District Court, appellant's counsel sought to have it confined to the rule set out in the petition, but the attorney for the government objected and the court—following decisions of this court—extended the injunction to the enactment of any similar rule.

Appellant's counsel objected to the decree also because its terms might be held to include the existing rule, as will appear from the 13th assignment of errors, which was for "not excluding from its effect and operation a rule of the board in force at the time of the trial."

It is thus left open to the Government, in proceedings for contempt against members of appellant, to contend that this decree prohibits also compliance with the existing rule.

Under these circumstances, has the question in this case become moot?

ARGUMENT.

I.

Nothing has occurred pending this appeal to render the question involved moot. The rule was repealed while the case was pending in the District Court. The question then, strictly speaking, is, whether the District Court erred in not entering—in lieu of its decree for appellee—a decree dismissing the suit without prejudice, because the repeal of the rule had rendered the controversy moot.

Such being the state of the case, it follows that, if the repeal of the rule rendered the controversy moot, the District Court erred, and this court will reverse with directions to that court to dismiss the bill without prejudice. Otherwise the decree of the lower court would remain for all time *res adjudicata* against appellant in any suit brought by appellee.

But, indeed, if the question had become moot after this appeal had been perfected, a dismissal of the bill without prejudice is the proper order under

United States v. *Hamburg Am. Co.*, 239 U. S. 446, 477.

II.

But the question still remains whether the question in controversy has become moot, and we respectfully submit that it has not.

The question raised by the bill was,—whether ap-

pellant, without violating the Sherman Anti-trust Act, could adopt, and enforce compliance by its members with, the then existing, or *any other* similar rule interfering with the right of its members to bid between the sessions of the board whatever price they saw fit for grain "to arrive."

The District Court met this question, as thus broadly stated, and decided that not merely the existing rule (which it was informed had been repealed), but any other similar rule, would violate the Sherman Act, and for this reason that court in very broad language enjoined appellant and its members from adopting or enforcing *any* rule interfering with the free right of members to bid between the sessions of the board any prices they pleased for grain "to arrive."

It seems proper here to state—although it does not appear in the record—that before the hearing in the court below, and after the repeal of the former rule, appellant and its counsel conferred with the Attorney General with a view to avoiding a trial, but for the reason—as he stated—that he wished to have the Sherman Act construed as respects such restrictions upon free competition—he declined to dismiss the bill. In takng this attitude he was well within his privilege, especially as appellant was in no position to assure him that the repealed rule would not thereafter be re-enacted.

It has by the decisions of this court become the well established rule that this court will not decide a question where, by reason of death, the repeal of a statute, the occurrence of a war of indefinite duration, the expiration of the term of office, or be-

cause the debt has been extinguished by payment, or the thing has been done and cannot be undone, or otherwise, neither party has any longer a legal interest in, or right to have decided, the question raised. Such were the cases of

Mills v. *Green*, 159 U. S. 651, 653.
Jones v. *Montague*, 194 U. S. 147.
Richardson v. *McChesney*, 218 U. S. 487.
Benz v. *Davis*, 242 U. S. 468.
U. S. v. *Hamburg American Co.*, 239 U. S. 475.
California v. *R. R.*, 149 U. S. 308.
Dinsmore v. *Southern Ex. Co.*, 183 U. S. 115.
Lewis Pub. Co. v. *Wyman*, 228 U. S. 610.

But in all of these cases, by the happening of an event both parties were left in a condition where they had no present legal interest or concern in the question involved.

Such is not the case at bar. Appellant confidently asserts and maintains that it has charter power to pass such a rule as the repealed rule, and that it is in no way a restraint upon trade under the Sherman Anti-trust Act.

The United States through its Attorney General still asserts and maintains the contrary.

If this court should decide the position of appellant to be the correct one, appellant probably will,—and in view of its great benefit to trade should,—at once re-enact the repealed rule. If, on the contrary, this court shall dismiss this case without a decision, appellant may be deterred from re-enacting this rule because the *decision*, as distinguished

from the decree, of the District Court remains unreversed, and should such a rule be re-enacted, it might be applied to subject individual members of the Board to criminal prosecutions.

Hence the case at bar is unlike all the foregoing cases, and is not distinguishable from

U. S. v. *Freight Assn.*, 166 U. S. 290,

a suit brought by the United States to adjudge violative of the Sherman Act a freight association. After judgment in the lower court the association was dissolved, and upon this ground the defendants asked this court to dismiss the appeal without deciding it; but this the court refused to do, saying:

> "The prayer of the bill filed in this suit asks not only for the dissolution of the association, but, among other things, that the defendants should be restrained from continuing in a like combination, and that they should be enjoined from further conspiring, agreeing or combining and acting together to maintain rules and regulations and rates for carrying freight upon their several lines, etc. The mere dissolution of the association is not the most important object of this litigation. The judgment of the court is sought upon the question of the legality of the agreement itself for the carrying out of which the association was formed, and if such agreement be declared to be illegal, the court is asked not only to dissolve the association named in the bill, but that the defendants should be enjoined for the future. * * * They do not admit the illegality of the agreement, nor do they allege their purpose not to enter into a similar one in the immediate future. On the contrary, by their answers the defendants claim that the agreement is a perfectly proper, legitimate and salutary one, and that it or one like it is necessary to the prosperity of the companies. * * *

> That question the government has the right to bring before the court and obtain its judgment thereon."

The principle of this case was reaffirmed in

So. Pac. R. Co. v. *Interstate Com. Com.*, 219 U. S. 498, 515,

where it was unsuccessfully sought to prevent a decision in this court because the order of the Interstate Commerce Commission there involved had expired by its own limitation before the appeal was reached in this court.

These two cases would seem to be controlling in the case at bar.

Again the United States was before the District Court in the position of a plaintiff who, while his right was being invaded, had filed a bill to enjoin, and the defendant had ceased the invasion during the pendency of the suit, intending hereafter, and proclaiming his intention, to resume the invasion as soon as the suit is out of the way. This situation has arisen in numerous cases (especially in patent infringements) in the lower federal courts, which have uniformly held that plaintiff was still entitled to his injunction.

A few of these cases are:

N. Y. Filter Co. v. *Chemical Co.*, 93 Fed. 827.

U. S. v. *Workingmen's Council*, 54 Fed. 994.

Celluloid Co. v. *Arlington Co.*, 34 Fed. 324.

Sawyer Spindle Co. v. *Turner*, 55 Fed. 979.

Jenkins v. *Greenwald*, 1 Bond, 126 Fed. case No. 7270.

Under the principle of these cases the District

Court did not err in disposing of this case upon the merits.

We do not know what the position of the Attorney General will be upon this question, but assume that he will adhere to the opinion previously expressed that despite the repeal of the first rule, this case should be decided and the Sherman Act construed in its application to rules of this character.

Whatever his present attitude, it should in no way affect this question. Its solution cannot depend upon the wishes of either of the parties. If the question has become moot, the wishes of either party are unimportant. If the question has not become moot, then either party is entitled to its decision, and the desire of the other party to avoid a decision is unimportant. While appellant was only a defendant below, it has no desire to have this case go off without a decision. On the contrary, it desires to know whether the rule in question or any similar rule violates the Sherman Act. If so, it wishes to comply with the law as so construed. If, on the contrary, the Sherman Act does not cover exchange rules of this character, it wishes to be free to enact, and enforce, them, to the end that its members and the public generally may enjoy the benefits which the evidence shows the repealed rule conferred on trade.

In view of the large expense, to which appellant has already been subjected by this litigation, its desire for a decision does not seem to be unreasonable.

Respectfully submitted,

HENRY S. ROBBINS,
For Appellant.

APPENDIX.

The regulation now in force respecting bids for grain "to arrive."

"After the regular market for grain to arrive has closed, any member may base his bid to persons located outside of Chicago, for wheat, corn, oats or rye to be shipped to this market, either upon the closing quotation of said 'to arrive' market, less the regular handling charges, or, upon a price higher than said closing quotation; provided, however, that the member or members departing in their bids from said closing quotations shall in every instance comply with the following conditions:

First: The handling charges prescribed in Section 32 of Rule IV shall be deducted from each and every such bid before the same is forwarded to persons located outside of Chicago.

Second: All members making such bids shall in every instance file with the secretary under seal before 8 a. m., on the next business day, or by U. S. mail on the afternon of the day on which such bids are made, their authority for making such bids. Such authority shall be evidenced, either by a *bona fide* bid in hand from a buyer at this market, or, by a clear showing that the member or members making such bids to persons outside of Chicago have, prior thereto, made to members here *bona fide* bids in suf-

ficient number and for sufficient quantities to establish fairly a new market level; and further such member or members must show the bids so made represent the price thus bid to the members here, less the regular handling charges."

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In the Supreme Court of the United States.

OCTOBER TERM, 1917.

No. 98.

BOARD OF TRADE OF THE CITY OF CHICAGO ET AL., APPELLANTS,

v.

THE UNITED STATES OF AMERICA.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

BRIEF FOR THE UNITED STATES.

STATEMENT OF THE CASE.

This is an appeal from a decree of the United States District Court for the Northern District of Illinois enjoining the Board of Trade of the City of Chicago, its officers, directors and members, in a suit by the United States under the Anti-Trust Law, 26 Stat., 209, c. 647, from giving effect to a certain provision of what is known as the "Call Rule," adopted by the Board in 1906.[1]

The rule in its entirety reads as follows:

> Sec. 33. A. The Board of Directors is hereby empowered to establish a public "Call" for

[1] *Subsequently* to the institution of this suit this rule was abrogated.

corn, oats, wheat and rye to arrive, to be held in the exchange room immediately after the close of the regular session of each business day.

B. Contracts may be made on the "Call" only in such articles and upon such terms as have been approved by the "Call" committee.

C. The "Call" shall be under the control and management of a committee consisting of five members appointed by the president with the approval of the Board of Directors.

D. Final bids on the "Call" less the regular commission charges for receiving and accounting for such property may be forwarded to dealers. It is the intent of this rule to provide for a public competitive market for the articles dealt in and that with such market all making of new prices by members of this association shall cease until the next business day.

E. Any transaction of members of this association made with intent to evade the provisions of this rule shall be deemed uncommercial conduct and upon conviction such members shall be suspended from the privileges of the association for such time as the Board of Directors may elect. (Pet., R. 5; Ans., R. 11.)

The Board maintains at Chicago a commercial exchange for dealings in grain, provisions, and other commodities. Its membership includes not only brokers and commission merchants, but proprietors of elevators, and millers, malsters, manufacturers of corn products, and others who buy and sell grain and provisions on their own account—more than 1,600 in all. (Canby, R. 19, 20.)

We borrow from the brief for appellants the following statement of the kinds of trading in which members of the Board engage:

> Grain, after it has reached Chicago and is either in cars or elevators, is extensively sold by sample and warehouse receipts. The rule in question does not relate to this kind of trading. (Rec., 111.)
>
> Another kind of trading (Rec., 10, 115) consists in the making of contracts of purchase and sale for delivery in a future month. The Board of Trade provides a space called a "pit," for each of the leading commodities so traded in, to which members desiring to trade for future delivery in such commodity resort. * * * The rule in question does not relate to this kind of trading.
>
> A third kind of trading—and the one to which the rule *does* apply—is the purchase and sale of grain "to arrive." This consists in sending out from Chicago daily bids for grain by members of this Board of Trade,—generally by mail, but occasionally by telegraph,—to grain dealers at country points within the grain section tributary to Chicago. The terms of such trading permit the shipment of the grain within a certain number of days—usually ten, but sometimes more. (Rec., 146.)
>
> These bids prescribe the time, within which the acceptance of the offer must be received in Chicago by the bidder, and this is usually before the opening of the market at 9:30 a. m. the next morning. (P. 3.)

The "Call" immediately follows the regular session[1] and lasts about half an hour, usually ending before 2 p. m. (R. 117, 139.) To all intents and purposes it is simply a prolongation of the regular session. (Nichols, R. 108.)

The witness Canby, president of the Board, described the operation of the "Call" as follows (R. 20):

> What is termed the "Call" was what you might call an auction. In other words, these prices were bids and offers. It was held during the early part of the afternoon, held at the close of the day's business in one corner of the Board of Trade. The caller had a stand and stood up and called the different grades of grain, and as he would call each grade he would ask for bids, and all the members that desired to send bids out in the country that afternoon to buy grain to arrive would bid on this call, and they could bid, every one bid any price they wanted to send out.

After the close of the "Call" trading proceeds as follows, as exemplified in the typical case of the Armour Grain Company:

> * * * the Armour Grain Company, after the Call was over, took the prices which were established on the Call and put our bids into the country on the basis of those prices. * * * We mailed those cards wherever the grain was; wherever we thought we could buy any grain we put the bids in. (Marcy, R. 91.[2])

---

[1] The regular session is from 9:30 a. m. to 1:15 p. m.; on Saturdays, from 9:30 a. m. to 12 n. (R., 11.)

[2] Other members testifying to the same effect were Stream, R. 99; Pierce, R. 100–101; Glaser, R. 101–102; Eckhardt, R. 114.

The points to which these bids were sent were located not only in Illinois, but in the grain-growing sections of other States tributary to the Chicago market—Ohio, Indiana, Missouri, Nebraska, Kansas, Iowa, North and South Dakota, Minnesota, Wisconsin. (Stream, R. 99; Marcy, R. 91; Pierce, R. 101; Eckhardt, R. 114.)

The provision of sub-division D of the rule, reading—

> It is the intent of this rule to provide for a public competitive market for the articles dealt in and that with such market all making of new prices by members of this association shall cease until the next business day,

as construed and enforced by the Board, absolutely prohibits members from competing as to price in the purchase and sale of corn, oats, wheat and rye at these country points, for Chicago delivery (i. e., grain "to arrive"), in the interval between the close of the "Call" and the opening of the regular session on the next day, by requiring all to quote the same price, namely, the final bid on the "Call" less the regular commission. (R. 96, 99, 100–101.)

It is this provision only which the Government now assails.

The charge of the bill is that by adopting and enforcing this provision, the Board, its officers, directors and members became parties to a combination in restraint of trade in violation of the Anti-Trust Law. (R. 5–6.)

The answer, while admitting the adoption and enforcement of the provision and its effect substantially as above stated (R. 11), avers that the purpose was not to prevent competition or to control prices (R. 11), but (a) to promote the health, comfort and welfare of members "by restricting their hours of business" (R. 11, 13), and (b) to break up a monopoly in this branch of the grain trade alleged to have been acquired by four or five large warehousemen in Chicago (R. 12).

On motion of the Government the allegation of the last-mentioned purpose was stricken from the answer on the ground that even if true it constituted no defense. (R. 15, 16.)

After a hearing the District Court entered a decree sustaining the charge of the petition and enjoining the Board, its officers, directors and members, in substance, from continuing to observe or give effect to the assailed provision, and from adopting or observing any rule or regulation of like character. (R. 165–167.)

ARGUMENT.

I.

BY ADHERING TO THE RULE IN QUESTION THE BOARD, ITS OFFICERS, DIRECTORS, AND MEMBERS, BECAME PARTIES TO A COMBINATION TO FIX A UNIFORM PRICE FOR BIDS FOR GRAIN AT COUNTRY POINTS, FOR CHICAGO DELIVERY, BETWEEN THE CLOSE OF THE CALL AND THE OPENING OF THE REGULAR SESSION ON THE NEXT DAY, THEREBY DIRECTLY AND SUBSTANTIALLY RESTRICTING COMPETITION AND RESTRAINING TRADE AMONG THE STATES.

The intended effect of the assailed regulation is to bind members of the Board to bid a uniform price in purchasing grain at country points, for Chicago delivery, between the close of the "Call" and the opening of the regular session on the following day. (Appellants' Br., p. 9.)

As stated, the points at which grain was thus purchased were located part in Illinois and part in neighboring States (*supra*, p. 5). The regulation, therefore, operated upon interstate commerce.

The manner in which this regulation restricted competition amongst members of the Board is best set forth in their own words contrasting conditions before and after the adoption of the regulation.

George E. Marcy, president of the Armour Grain Company (R., 96):

> The effect of the rule was that whereas before its adoption there were offers sent out by this, that and the other man here in Chicago through the wheat producing territory after the Board of Trade closed on one day,

bids sent out at whatever figure the bidder wanted to name, after this rule was adopted that figure was the last named highest figure before 'Change closed on that day, and he was limited to that.

John P. Stream (R., 99):

> Prior to the adoption of that rule we, and others on the Board of Trade, would arrive at a figure that we thought we could afford to bid for grain to arrive, based on conditions existing at that time, and we would send out those bids broadcast, and these were transmitted to the various sellers and owners of grain in the country by means of cards and telegrams, almost every day; they were sent over the grain territory, Iowa, Illinois, sometimes Nebraska, and Missouri and Indiana, sometimes Kansas. After the rule was adopted in 1906 we had to follow the rule, and send out the prices as made by the Call on that day. There was no other price to submit to these various sellers between the close of the Call and the opening of the Board the next morning at 9:30.

Charles B. Pierce, of Bartlett, Frazier & Company (R., 100–101):

> I am familiar with the manner in which grain is purchased to arrive, and was purchased, prior to the adoption of the Call rule. We bought grain under the same methods we always have, and that we did then, and now, that is, by giving bids over night by post card and by letter, or through the day by telephone

> or telegraph, as the case may be. Whatever our judgment indicated as the price that we desired to purchase at, that price was transmitted over the country on postal cards and by telegraph, prior to the adoption of this rule. And after this rule was adopted in 1906 the price communicated on grain to arrive by postal cards and telegrams was determined by the price fixed at the call, on all bids that we sent out while the market was not in session between the adjournment of the Call meeting and the opening of the Board upon the following morning. *If our judgment dictated that a higher price should be paid than that fixed on the Call, we could not offer that price.* [Italics ours.]

The potency of members of the Board in the grain trade is reflexly shown by the primacy of the Board among grain markets of the world. "Chicago," said the witness Patten, "is the greatest grain market in the world. The whole world looks to Chicago for its prices." (R., 103.) The answer itself avers that the Board "is a great commercial center for the transaction of business in wheat, corn, oats, rye and other grain." (R., 10.)

An agreement between men occupying a position of such strength and influence in any branch of trade to fix the prices at which they shall buy or sell during an important part of the business day is an agreement in restraint of trade within the narrowest definition of the term.

As the Circuit Judges observed in *United States* v. *United States Steel Corporation*, 223 Fed., 55, 155—

> When individuals or corporations make distinct contracts with each other, either in the form of pools or other agreements, dividing territory, limiting output, or fixing prices, there can be no question about the illegality of such contracts.

Such agreements belong to the class described by the Chief Justice in the *Standard Oil Case*, 221 U. S., 1, 56, 59, as "in restraint of trade in the subjective sense"—agreements by which one "voluntarily and unreasonably restrains his right to carry on his trade or business"; or, in the language of Mr. Justice Holmes:

> They are contracts with a stranger to the contractor's business (although in some cases carrying on a similar one), which wholly or partially restrict the freedom of the contractor in carrying on that business as otherwise he would. (*Northern Securities Case*, 193 U. S., 197, 404.)

There is a complete analogy in principle between the present case and *Swift & Co.* v. *United States*, 196 U. S., 375, where it was held that an agreement of packers not to bid against each other in the purchase of cattle violates the Anti-Trust Law. The members of the Board of Trade agreed not to bid against each other in the purchase of grain at country points.

It is of no legal consequence that the restriction operates only during the afternoon. The afternoon is an important part of the business day, particularly in this branch of the grain trade. As defendants' witness Ray testified—

> You will find out in the country that a large percentage of the grain is bought in the afternoon, especially at this time of year and in December, when farmers have done lots of hard work all through the summer, and they became a little lazy like, get up late in the morning, and they hardly get to town to do business before about noon. (R., 128–129.)

Moreover, if such a restriction may be imposed in the afternoon, why may it not be imposed in the morning?

To the naïve inquiry in appellants' brief (p. 19–20)—

> How can anyone affirm that the competition, *if delayed until the next morning*, will not be as keen, and result in as good prices, as if it took place in the preceding afternoon [italics ours],

we reply—

> It is not for the Board to ordain that owners of wheat at country points shall not have a competitive market in which to sell in the afternoon.

Counsel for the Board was at pains to bring out that a member desiring to buy wheat in the afternoon from an elevator *in Chicago* could do so without any restriction at all as to price; that the rule "did not in the slightest affect the price at which the owners

of wheat in elevators could sell." (R., 22, 23, 94, 111.)

This but emphasizes the illegality of the restriction.

Why make a difference between buying wheat in the afternoon from elevators *in Chicago* and buying wheat in the afternoon at country points for subsequent delivery in Chicago? Why should members be free to compete in the one case and restricted to one price in the other? Why should sellers of wheat *in Chicago* enjoy a competitive market in the afternoon while sellers of wheat at country points are denied one?

II.

THE CONTENTION THAT THE RULE WAS BENEFICIAL IN OPERATION.

It is claimed for the rule (a) that it "is nothing more than a rule limiting the trading hours of its members," with the object of promoting their health and comfort (Appellants' Br., pp. 15, 20, 26); (b) that by inducing more members to participate the rule has kept trading in grain "to arrive" from being monopolized by a few, as formerly (ibid., pp. 15, 17, 21); (c) that it has afforded those having grain to sell at country points a market in the interval between the close of business on the Board on one day and the opening on the next (ibid., pp. 16, 21); (d) that it has apprised such persons more promptly of the prevailing prices in the Chicago market (ibid., p. 21); (e) that it has enabled such persons to fulfill their

contracts by tendering grain arriving at Chicago on *any* railroad, whereas formerly shipments had to be made over the particular railroad designated by the buyer (ibid., pp. 16, 17, 21); (f) that it has enabled the grain merchants of Chicago to work upon a narrower margin of profit and thereby to pay more for grain and to sell cheaper, thus making the Chicago market more attractive to shippers and grain buyers (ibid., p. 21).

This is but another way of saying that good intentions and some good results can save the rule from illegality. Where, however, as here, the necessary effect of an agreement or combination is unduly to restrict competitive conditions, the purpose or intention of the parties is immaterial. Agreements or combinations producing that effect are prohibited by the Act of Congress; and on the most elementary principles a transaction which the law prohibits is not made lawful by an innocent motive or purpose. *United States* v. *Trans-Missouri Freight Ass'n*, 166 U. S. 290, 341; *Addyston Pipe Co.* v. *United States*, 175 U. S. 211, 234, 243; *Swift & Co.* v. *United States*, 196 U. S. 375, 396. The intent to violate the law implied from doing what the law prohibits renders immaterial every other intent, purpose, or motive. *Bishop, New Criminal Law*, sec. 343; *Holmes, The Common Law*, p. 52.

In *Thomsen* v. *Cayser*, 243 U. S. 66, after hearing "the good intention of the parties, and, it may be, some good results," once more put forward as a

defense under the Anti-Trust Law, this Court disposed of the contention in language which should be final:

> The argument that is employed to sustain the contention is one that has been addressed to this court in all of the cases and we may omit an extended consideration of it. It terminates, as it has always terminated, in the assertion that the particular combination involved promoted trade, did not restrain it, and that it was a beneficial and not a detrimental agency of commerce.
>
> We have already seen that a combination is not excused because it was induced by good motives or produced good results, and yet such is the justification of defendants. (P. 86.)

It follows, that were the good intentions or good results claimed in this case conceded, it would make no difference.

For this reason the District Court was right in striking from the answer, as legally irrelevant, paragraph 6 averring that one purpose of the "Call Rule" was to break up an existing unlawful monopoly in trading in grain "to arrive."[1] Moreover, the law, Federal and State, provides remedies for monopolies and restraints of trade.

As a matter of fact, however, with a single exception, none of the benefits claimed is attributable to the particular provision of the rule which the Government is attacking, i. e., the price-fixing restriction.

---

[1] The fact is that all the circumstances and conditions leading to the adoption of the rule were brought out by the defendants at the trial, and in no possible view, therefore, were they injured by the striking of paragraph 6 from their answer. (R., 107–108, 112, 143–144.)

Neither that nor any other provision of the rule limits the hours of trading. As stated by the witness Nichols, who was produced by defendants and described himself as "in a sense the father of the rule,"

> We amended the rule prohibiting trading after 1:15 and established an afternoon session which was called the "Call," beginning practically at 1:30 and running until midnight or 9:30 the next morning if the traders cared to stay. (R., 108.)

So far, therefore, from being a measure to protect the health and comfort of members by restricting the hours of trading, the rule really removed a restriction of that character already existing, only, however, to impose a restriction as to prices.

Again, there is no apparent relation between the price-fixing restriction and the increase in the number of members of the Board engaged in trading in grain "to arrive"; and no effort was made to show any.

Nor is there any relation between the price-fixing restriction and the creation of a market for those having grain to sell at country points in the interval between the close of business on the Board on one day and the opening on the next. That result was due to the practice, in no wise questioned, of sending out bids in the afternoon to country points.

It was due to that practice again, and obviously not to the price-fixing restriction, that sellers of grain at country points were more promptly informed of the prevailing prices in the Chicago market.

The privilege enjoyed by traders under the operation of the "Call Rule" of tendering in fulfillment of their contracts grain arriving at Chicago over *any* railroad instead of over the particular railroad designated by the buyer was due to a new form of contract. (R., 126, 138.) The price-fixing restriction had nothing to do with it.

The claim that the rule enabled the grain merchants of Chicago "to work upon a closer margin of profit" doubtless has reference to the supposed advantage of a fixed price. This is the one exception to the statement that all the benefits claimed for the rule are referable to some other provision than the one under attack. And here, of course, the answer is that however beneficial a fixed price might be according to the point of view of the Board, Congress has proceeded on a different economic theory.

It must be kept in mind, therefore, in reading of the alleged advantages of this rule as set forth in the brief for the Board and in the testimony of the witnesses introduced on its behalf, that in practically every instance the alleged advantage is in no way whatever dependent upon the only provision of the rule which the Government is now attacking, namely, the price-fixing restriction.

III.

THE CONTENTION THAT UNDER THE POWER TO MAKE REGULATIONS FOR THE CONDUCT OF ITS MEMBERS THE BOARD COULD PROHIBIT MEMBERS FROM TRADING AT ALL AFTER A CERTAIN HOUR OR WITH NON-MEMBERS, AND THAT THEREFORE IT COULD DO THAT WHICH IS LESS—PRESCRIBE THE PRICE AT WHICH MEMBERS MAY TRADE AFTER THE GIVEN HOUR OR WITH NON-MEMBERS.

Another defense is, that under the power to make regulations for the conduct of its members the Board could prohibit members from trading at all after a certain hour or with non-members, and that, therefore, it can do that which is less—prescribe the price at which members may trade after the given hour or with non-members. (Appellants' Br., p. 30.)

The proposition that the Board might lawfully have prohibited *all* trading by its members after a certain hour is mere assertion, unsupported either by reason or authority. It suggests a hypothetical case for decision in lieu of the one before the court. The assertion is based, apparently, on the circumstances that "banks prescribe and conform to shorter business hours than other branches of business," that "labor unions combine to shorten hours," that the Chicago Board of Trade itself has for years "maintained a rule confining future trading *in its exchange building or in its vicinity*[1] to less than four hours a day," and on the supposed analogy of various rules shown to be in vogue at other commercial exchanges. (Appellants' Br., 24–25, 30; R. 155, 159–163.)

It may be conceded that the instances cited support by analogy the right of the Board to regulate the duration of its sessions—to restrict trading on the

[1] Italics ours.

exchange within prescribed hours. But the present proposition goes much further. It asserts the right of the Board not only to say when the exchange shall close but to prohibit thereafter any trading whatever by members, whether on the floor of the exchange or elsewhere. This transcends any reasonable regulation of the conduct of members.

Almost without exception the supposedly analogous rules of other exchanges relate to the conduct of members *in and about the exchange halls*—a very different thing from prohibiting members from trading altogether after the closing of the exchange. In the few instances where they might superficially appear to prohibit trading generally after exchange hours it is not clear in the absence from the record of any authoritative exposition of the rules that they really had that effect or were intended to do more than to prohibit public trading by members, after the prescribed hours, in or about the exchange halls.[1]

[1] Thus the rule of the Chicago Board of Trade respecting future trading (R. 155) does not absolutely prohibit such trading outside exchange hours, but merely prohibits future trading in the exchange hall or its vicinity. (*Supra*, p. 17.)

The rule of the New York Cotton Exchange limiting hours of trading has reference on its face to trading "*on the floor of the exchange.*" (R. 160.)

The similar rule of the New York Coffee Exchange prohibits trading after hours "*in exchange or its vicinity.*" (R. 161.)

The rule of the New York Stock Exchange restricting hours of trading (R. 159–160) refers to dealings in the exchange, or publicly in its vicinity. While dealings in stocks "*publicly* outside of the exchange, in any place" are stated to be in contravention of the purpose and intent of the rule, the context would indicate that this is only in the sense that contracts so made are not recognized or enforced by the governing committee of the exchange.

The rule of the Consolidated Stock Exchange of New York prohibiting transactions in any of the securities dealt in on the exchange before or after exchange hours "in the rooms of the association *or elsewhere*" is qualified by the statement that "this is to apply to trading *outside of the railing, in the corridors of the exchange, and on the street in the vicinity of the exchange.*" (R. 161.)

Nor does the proposition that the Board could prohibit altogether trading between members and non-members rest upon any stronger foundation. The case of *Anderson* v. *United States*, 171 U. S. 604, supports no such proposition. The question there, as stated by the Court, was "whether, without a violation of the Act of Congress, persons who are engaged in the *common business as yard traders* of buying cattle at the Kansas City stock yards * * * may agree among themselves that they will form an association for the better conduct of their business, and that they will not transact business with *other yard traders* who are not members." (171 U. S. 613–614.) [Italics ours.] Observe that the prohibition was against dealing with "other yard traders," i. e., others "engaged in the common business of buying cattle at the Kansas City stock yards." Giving the case its widest application it carries no suggestion that this exchange could have prohibited altogether trading in cattle between its members and persons who were not members; e. g., could have prohibited its members from buying cattle at country points for shipment to Kansas City. On the contrary, it was expressly stated in the opinion that the rule "has no tendency * * * to place any impediment or obstacle in the course of the commercial stream which flows into the Kansas City cattle market." (P. 619.)

Even, however, should this Court agree with the hypothetical premise that the Board could have pro-

hibited *all* trading by members after exchange hours, or *all* trading with non-members, it would still not follow that the Board, as a condition of withholding such prohibition, could *prescribe the prices* at which members should buy or sell. In the *Anderson Case*, upon which this branch of the defense rests, the Court laid especial emphasis upon the fact that the rule "has nothing whatever to do * * * with fixing the prices for which the cattle may be purchased or thereafter sold" (p. 614); that "this association does not meddle with prices" (p. 617).

The argument is similar to the one sometimes made that because individuals or corporations might abstain from commerce altogether they are therefore at liberty to say on what terms they will engage in it. Thus in *Thomsen* v. *Cayser*, *supra*, p. 13, 243 U. S. 66, it was urged in behalf of certain steamship lines that because they were volunteers in ocean shipping, free to go or come as they liked, therefore they might have withheld their service except on the illegal conditions they sought to impose. Mr. Justice McKenna answered the contention as follows (87–88):

> This can be said of any of the enterprises of capital and has been urged before to exempt them from regulation, even when engaged in business which is of public concern. The contention has long since been worn out and it is established that the conduct of property embarked in the public service is subject to the policies of the law.

IV.

THE CONTENTION THAT THE RESTRICTION OF COMPETITION CAUSED BY THE RULE WAS ONLY INCIDENTAL AND TOO SMALL TO BE TAKEN INTO ACCOUNT.

Again, it is said that the restriction of competition caused by the rule was only incidental and "too small to be taken into account."

There is doubtless a principle of *de minimis* in the Anti-Trust Law as elsewhere; but there is no room for its application here, either in respect to the nature and extent of the restriction imposed or with reference to the volume of commerce on which it operated. The short answer to the contention is that the restriction was not "incidental"; it was direct and deliberate—the defendants "intended to make the very combination and agreement which they in fact did make."[1]

The following statement from the opinion in the *Anderson Case* is relied upon:

> If for the purpose of enlarging the membership of the exchange, and of thus procuring the transaction of their business upon a proper and fair basis by all who are engaged therein, the defendants refuse to do business with those commission men who sell to or purchase from yard traders who are not members of the exchange, *the possible effect of such a course of conduct upon interstate commerce is quite remote, not intended and too small to be taken into account.* (171 U. S., 604, 618–619.) [Italics ours.]

[1] Addyston Pipe Case, 175 U. S. 211, 243.

This language refers to the remoteness of a merely possible effect *which was not intended.* It has no reference either to *intended* restraints or to *volume* of commerce affected.

Moreover, the restriction here, besides being direct and deliberately imposed, was drastic, not slight; it interposed an absolute barrier against free agency in price making at all times when the Board was not in session. The volume of business affected was also substantial. (R. 21.) The record shows that this trade in grain "to arrive" was a sufficiently attractive bone of contention among members of the Board to produce a condition which Vice-President Griffin, a witness for the defendants, described as bordering on "civil war" (R. 143). A branch of interstate commerce which was thus of enough magnitude and importance to call forth a special restraining rule of the Board, the largest grain market in the world, must be deemed of enough importance to call for the application of the countervailing rule of Congress declaring that interstate commerce shall be unrestrained.

Appellants seek to minimize the extent of their restraint on commerce by showing that the schedule of mail trains effective at Chicago interposed a practical limitation on dealings in grain to arrive after about 6 o'clock in the evening, and from this they argue that the restriction due to the rule prevailed only for "about two or three hours at the end of the business day" (Br., p. 9). A restraint of trade during part of the business day can not be justified, however,

by leaving it free during the remaining part. The law intends that it shall be free at all times.

In any event, however, the contention has no foundation in fact. The record shows that bids were sent to the country by telegraph and telephone as well as by mail. (R. 91, 114, 117.) These instrumentalities were available at all hours and it does not appear that they were on the whole used less than the postal facilities. The witness Hubbard, in extolling the advantages of the "Call Rule," testified that its effect in his business was to establish a market on commercial grades of grain *for practically the twenty-four hours of the day* (R. 123).

V.

THE CONTENTION THAT INTERSTATE COMMERCE IS NOT INVOLVED.

It is also urged that the decree should be reversed on the ground that the subject-matter upon which it operates is purely *intrastate* commerce because the contracts made for the purchase or sale of grain "to arrive" do not in terms *require* the grain to be shipped in interstate commerce. It is said that in order "to make the transaction of sale interstate, the parties should contemplate, and their contract should require, the shipment of property from one State to another." (Appellant's Br., 31–33.)

The answer is twofold.

First. The transactions pursuant to the "Call Rule" actually were in large measure of interstate

character. Bids were sent out broadcast to persons outside of Illinois who were the owners and shippers of grain located in States other than Illinois, offering to purchase their grain "to arrive" at Chicago. The parties to the resulting contracts did contemplate the shipment of property from one State to another, and property was actually so shipped in the performance of the contracts. Therefore interstate commerce was directly involved as the subject-matter of this suit and the appellant's contention has no basis in fact.

Second. It makes no difference, however, whether particular contracts made pursuant to the "Call Rule" were or were not interstate transactions. Regardless of the character of the transactions, the "Call Rule" and the concerted action under it directly restrained an actual current of interstate commerce consisting of the grain moving from States other than Illinois to the Chicago market by precluding members of the Board of Trade from competing with each other in the purchase of such grain after exchange hours. *Loewe* v. *Lawlor*, 208 U. S. 274; *Temple Iron Co.* v. *United States* (*United States* v. *Reading Company*), 226 U. S. 324, 357–358.

The case is like *United States* v. *Patten* (*Cotton Corner Case*), 226 U. S. 525, 543–544, where a conspiracy to run a "corner" in cotton was held to be an unlawful restraint on the whole volume of interstate commerce in that commodity even though the restraining acts were not altogether, if at all, interstate transactions.

Ware & Leland v. *Mobile County*, 209 U. S. 405, and *Engel* v. *O'Malley*, 219 U. S. 128, ane not in point. In the *Ware & Leland Case* the defendants were brokers who took orders in Alabama, and transmitted them by telegraph to points outside the State, for the purchase and sale of cotton on speculation. The contracts so negotiated did not require, nor did they ordinarily entail, the shipment of any cotton in interstate commerce, and it was accordingly held that the imposition of a license tax on the business of making the contracts did not obstruct or interfere with interstate commerce. In *Engel* v. *O'Malley* the contention was that the exaction of the license tax amounted to a restraint on the interstate transmission of funds. The Court held otherwise because the law "was passed for the purpose of regulating and safeguarding *the business of receiving deposits*, which precedes and is not to be confounded with the later transmission of money, although leading to it." (Mr. Justice Holmes, p. 139. Italics ours.)

Both cases go merely to the question whether certain state tax laws burdened or directly affected interstate commerce. It does not follow that a given transaction is outside the body of interstate commerce because the State taxing power may be permitted to operate upon it. As said in the *Swift Case*, 196 U. S. 375, 399–400:

> But it may be that the question of taxation does not depend upon whether the article taxed may or may not be said to be in the course of commerce between the States, but

> depends upon whether the tax so far affects that commerce as to amount to a regulation of it. * * * But we do not mean to imply that the rule which marks the point at which state taxation or regulation becomes permissible necessarily is beyond the scope of interference by Congress in cases where such interference is deemed necessary for the protection of commerce among the States.

VI.

CONCERNING THE SCOPE OF THE DECREE.

Lastly, the claim is made that the decree [1] is too broad, first, because certain of its injunctive provisions are not in terms restricted in their operation to interstate commerce (Appellant's Br., 33), and second, because it "enjoins future acts of defendants respecting the fixing of prices, which acts are in no way similar to the rule in question." (Ibid., 6, 38–39.)

The first proposition is addressed specifically to paragraph 1, sub-paragraphs (a), (b) and (c). If

[1] The decree, paragraph 1, finds that the Board of Trade of the City of Chicago, its officers and directors, "by adopting, acting upon and enforcing" the Call rule became parties to a combination and conspiracy to restrain interstate trade and commerce in violation of the Sherman Law. It permanently enjoins the Board, its members, officers and directors named in the petition and their successors in office, agents, etc., "from carrying out or attempting to carry out the aforesaid combination or conspiracy, and from entering into any other like combination or conspiracy among themselves or one with another to restrain interstate or foreign trade or commerce in the articles corn, oats, wheat and rye or any of them, by means or devices similar to those herein specifically enjoined," and each and all are "permanently enjoined and restrained—

(a) From agreeing or acting together or one with another, expressly or impliedly, directly or indirectly, for the purpose or with the effect of maintaining a limited price or any price for the articles corn, oats, wheat and

these were isolated from the language immediately preceding, there would be some merit in the contention that according to their terms they apply as well to intrastate as to interstate commerce. Taking the entire context, however, it is clear that the provisions have reference only to the latter. This objection, moreover, is raised now for the first time. It was not assigned as error.

On the proposition that the decree enjoins "future acts * * * in no way similar to the rule in question," it is enough to say that the decree, as appears on its face, merely enjoins the continuance of the combination found to exist, or any similar one, either by means of the "Call Rule" or by any like rule or device. This much was necessary to prevent the recurrence of the evil which the case disclosed. *United States* v. *Trans-Missouri Freight Association*, 166 U. S. 290, 308; *Swift & Company* v. *United States*, 196 U. S. 375, 400. It was said in the *Swift Case*, "Under the [Sherman] act it is the duty of the court, when applied to, to stop the

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rye or any of them, which may be arrived at by virtue of a certain 'Call' rule [setting forth the rule].

(*b*) From enforcing, acting upon or hereafter adopting any similar rule, regulation, by-law or practice or agreeing or acting together or one with another, expressly or impliedly, directly or indirectly, for the purpose or with the effect of fixing or maintaining a price on the articles corn, oats, wheat or rye for any specified time or times.

(*c*) From enforcing, acting upon or hereafter adopting any rule, regulation, by-law or practice or agreeing or acting together or one with another, expressly or impliedly, directly or indirectly, to the effect that members of said Board of Trade of the City of Chicago shall fix offers or bids which may be made to dealers in the articles corn, oats, wheat or rye to arrive, which said offers or bids are to be made between the regular sessions of said Board of Trade of the City of Chicago." (R. 165–167.)

[unlawful] conduct" (p. 400). That is all the decree in this case did when it enjoined the defendants from entering into any agreement for the purpose or with the effect of "fixing or maintaining a price on the articles corn, oats, wheat or rye, for any specified time or times."

CONCLUSION.

The decree of the District Court should be affirmed.

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DECEMBER, 1917.

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In the Supreme Court of the United States.

OCTOBER TERM, 1917.

No. 98.

BOARD OF TRADE OF THE CITY OF CHICAGO ET AL., APPELLANTS,

v.

THE UNITED STATES OF AMERICA.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

MEMORANDUM ON BEHALF OF THE UNITED STATES ON THE QUESTION WHETHER THE CASE IS MOOT.

This memorandum is submitted pursuant to an order of this Court entered January 14, 1918, reading as follows:

> How far the repeal before judgment below of the order or rule of the Board of Trade which is in controversy caused the question of its validity to afford no longer a basis for judicial action because it thereby became purely moot, was not noticed in the arguments submitted on the hearing. Attention of counsel is now directed to that subject and permission granted to file such printed suggestions concerning it as they may be advised on or before Monday, the 28th instant.

The decree was not attacked by defendants on the ground that the repeal of the regulation in ques-

tion before entry of the decree but after the institution of the suit rendered the case moot; and the Government did not raise the question of its own motion because of opinion that it had been settled by the decision and reasoning of this Court in *United States* v. *Trans-Missouri Freight Association*, 166 U. S. 290, 308.

Section 4 of the Sherman Law confers upon the Federal Courts jurisdiction to "prevent and restrain" violations of the act. The power thus granted not only contemplates the striking down of the particular unlawful combination before the court, but includes, in addition, authority to look to the future and enjoin similar combinations between the same parties and other acts violative of the statute like those shown to have been committed in the past. Thus in the *Standard Oil Case*, 221 U. S. 1, the Chief Justice said (pp. 77-78):

> * * * to meet the situation with which we are confronted the application of remedies twofold in character becomes essential: 1. *To forbid the doing in the future of acts like those which we have found to have been done in the past which would be violative of the statute.* 2. The exertion of such measure of relief as will effectually dissolve the combination found to exist in violation of the statute, and thus neutralize the extension and continually operating force which the possession of the power unlawfully obtained has brought and will continue to bring about. [Italics ours.]

It would seem to follow, therefore, from the very nature of the jurisdiction conferred, that once a proceeding has been brought to adjudicate an existing combination and to obtain adequate safeguards against future violations of like character by the same defendants, the judicial function can not be stayed by the abrogation by the parties themselves, pending litigation and before the court reaches the point of ordering relief, of the specific combination assailed, *but without any guaranty against repetition of like conduct in the future. United States* v. *Trans-Missouri Freight Ass'n, supra; United States* v. *Workingmen's Council of New Orleans*, 54 Fed. 994. To allow matters to rest in such a posture, without proceeding to a final judicial determination of the issues, would be in effect to substitute in place of the court's order the mere pleasure of the defendants themselves as the only assurance against future invasions of the law.

In the *Trans-Missouri Case*, notwithstanding that the assailed combination had been voluntarily abandoned in the meantime, this Court entertained an appeal from a decree dismissing the bill, reversed that decree, and directed that a decree be entered granting the relief asked.

It is true that in that case the combination was still in existence at the time of the entry of the lower court's decree dismissing the bill, but it was *not* in existence at the time of the entry of the decree directed by this Court adjudging the combination unlawful and enjoining its execution and any other of like character.

This Court said in the *Trans-Missouri Case* (166 U. S., 308):

> The prayer of the bill filed in this suit asks not only for the dissolution of the association, but, among other things, that the defendants should be restrained from continuing in a like combination, and *that they should be enjoined from further conspiring, agreeing, or combining and acting together* to maintain rules and regulations and rates for carrying freight upon their several lines, etc. *The mere dissolution of the association is not the most important object of this litigation.* The judgment of the court is sought upon the question of the legality of the agreement itself for the carrying out of which the association was formed, and if such agreement be declared to be illegal, the court is asked not only to dissolve the association named in the bill, *but that the defendants should be enjoined for the future.*
>
> The defendants, in bringing to the notice of the court the fact of the dissolution of the association, take pains to show that such dissolution had no connection or relation whatever with the pendency of this suit, and that the association was not terminated on that account. They do not admit the illegality of the agreement, nor do they allege their purpose not to enter into a similar one in the immediate future. On the contrary, by their answers the defendants claim that the agreement is a perfectly proper, legitimate, and salutary one, and that it or one like it is necessary to the prosperity of the companies. [Italics ours.]

So, in this case, the petitioner seeks not merely the decision of the court on the question of the legality of the "Call Rule," which was the specific instrument by means of which the alleged unlawful restraints were accomplished up to and including the time when the issues were joined in the trial court, but if that rule is held to be illegal then the court is asked to go further and enjoin the defendants "from entering into any [other] combination or agreement fixing the bids which may be offered to dealers between the regular sessions" of the Board of Trade for wheat, corn, oats and rye "to arrive". (Pet., R. 7.) In other words, the court is asked to dissolve the specific combination shown to exist and also *"to forbid the doing in the future of acts like those * * * found to have been done in the past which would be violative of the statute."* [1]

Here, also, as in the *Trans-Missouri Case*, the defendants, after the commencement of proceedings against them, abrogated the particular instrumentality or medium of combination set forth in the pleadings, but without disclaiming either their asserted right or their intention to continue, or at will resume, the very restraints in force when the suit was filed.

Here again, as in that case, to refuse a judicial determination of the issues involved would leave the defendants free to continue their challenged conduct; for, having voluntarily revoked the "Call Rule," they could, unless enjoined, just as easily reenact it—or if they did not choose to do that, could produce identical results by like devices.

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[1] *Standard Oil Case*, 221 U. S. 1, 78.

The present case is not like *United States* v. *Hamburg-American Co.*, 239 U. S. 466, 477, where the combination involved had become disrupted and impossible of performance and the business of the parties to it had ceased, owing to extraneous events. The only change here has been to substitute one rule of the Board of Trade for another, and the defendants may at any time reverse the process; the organic association of the parties through the medium of the board continues as before; their business also continues.

In its opinion this Court differentiated the *Hamburg-American Case* from the *Trans-Missouri Case* and, as we think, from the present case, as follows (pp. 476–477):

> Nor is there anything in *United States* v. *Trans-Missouri Freight Association*, 166 U. S. 290, and *Southern Pacific Terminal Co.* v. *Interstate Commerce Commission*, 219 U. S. 498, which conflicts with this fundamental doctrine. In the first, the *Trans-Missouri Case*, a combination between railroads charged to be illegal was by consent dissolved and it was held that in view of the continued operation of the railroads and the relations between them their mere consent did not relieve of the duty to pass upon the pending charge of illegality under the statute of their previous conduct, since by the mere volition of the parties the combination could come into existence at any moment. Leaving aside some immaterial differences, in terms the ruling in the *Southern Pacific Case* was based upon the decision in the *Trans-Missouri Case*. Here on the con-

> trary the business in which the parties to the combination were engaged has by force of events beyond their control ceased and by the same power any continued relation concerning it between them has become unlawful and impossible. The difference between this and the *Trans-Missouri Case* was clearly laid down in *Mills* v. *Green*, 159 U. S. 651, where after announcing the general rule as to the absence of authority to consider a mere moot question and referring to possible exceptions resulting from the fact that the want of actuality had arisen either from the consent of the parties or the action of a defendant, it was declared (p. 654): "But if the intervening event is owing to the plaintiff's own act or to a power beyond the control of either party, the court will stay its hand."

The situation in this case in the trial court after the repeal of the "Call Rule" was like that in *United States* v. *Workingmen's Council of New Orleans*, 54 Fed. 994, which was a suit to restrain defendants (strikers) from interfering with interstate or foreign commerce. It was urged that "the strike or cessation of labor being ended, and labor resumed throughout all branches of business," (p. 995) there was no need for an injunction. But the District Court disagreed, saying (pp. 995–996):

> I know of no rule which is better settled than that the question as to the maintenance of a bill, and the granting of relief to a complainant, is to be determined by the status existing at the time of filing the bill. Rights do not ebb and flow. If they are invaded, and recourse to

> courts of justice is rendered necessary, it is no defense to the invasion of a right, either admitted or proved, that since the institution of the suit the invasion has ceased. *With emphasis would this be true where, as here, the right to invade is not disclaimed.* The question, then, is, what was the state of facts at the time of and prior to the filing of the bill? or whether, if the facts alleged in the bill were true at that time, there was need of an injunction. [Italics ours.]

This decision was affirmed by the Circuit Court of Appeals for the Fifth Circuit, 57 Fed. 85; it was also cited with approval by this court in *Loewe* v. *Lawlor*, 208 U. S. 274, 301, where the opinion is quoted at length (pp. 301–302).

The doctrine of the foregoing cases under the Sherman Law, which shows that we still have here an actual controversy despite the repeal of the "Call Rule," is confirmed by analogous cases in other fields of the law.

In *Southern Pacific Terminal Co.* v. *Interstate Commerce Commission*, 219 U. S. 498, where an order of the Interstate Commerce Commission under consideration by the court had expired by limitation and it was argued that the case had on that account become moot, Mr. Justice McKenna, after citing with approval the *Trans-Missouri Case, supra*, and *Boise City Irr. & Land Co.* v. *Clark* (C. C. A. 9th), 131 Fed. 415, said (pp. 515, 516):

> In the case at bar the order of the Commission may to some extent (the exact extent it

is unnecessary to define) be the basis of further proceedings. But there is a broader consideration. The questions involved in the orders of the Interstate Commerce Commission are usually continuing (as are manifestly those in the case at bar) and their consideration ought not to be, as they might be, defeated, by short term orders, capable of repetition, yet evading review, and at one time the Government and at another time the carriers have their rights determined by the Commission without a chance of redress. (p. 515.)

* * * * *

In *Boise City Irr. & Land Co.* v. *Clark*, *supra*, the period for which a municipal ordinance fixed a water rate expired pending the litigation as to its legality, and it was contended that the case had become moot. The court replied: "But the courts have entertained and decided such cases heretofore, partly because the rate, once fixed, continues in force until changed as provided by law, and partly because of the necessity or propriety of deciding some question of law presented which might serve to guide the municipal body when again called upon to act in the matter." (p. 516.)

Russell v. *Tate*, 52 Ark. 541, was an action to enjoin the mayor, aldermen and treasurer of Russellville, Arkansas, from devoting municipal funds to the construction of a county court house. The bill sought among other things to secure the cancellation of a warrant claimed to have been unlawfully issued. An attempt was made to oust the jurisdiction of the

court by the defendants' recalling and cancelling the warrant. But the court said (p. 545):

> The fact that after the suit was brought the city council recalled and cancelled the unpaid warrant did not oust the jurisdiction of the court. That was but part of the purely equitable relief demanded. *It was desired to prevent its reissue* and cancel the appropriation. Besides, under our chancery system had the cancellation of the warrant been the only original ground of equity jurisdiction, it was not lost. *Price* v. *State Bank*, 14 Ark. 50. [Italics ours.]

In *Roberts* v. *Louisville*, 92 Ky. 95, residents of Louisville sued to enjoin the city, its mayor and general council, from passing an ordinance transferring certain municipal wharf property. After the institution of the suit the ordinance was withdrawn. It was held (p. 96) that "the fact that the proposed ordinance has been withdrawn from the council, pending this action, does not affect the plaintiffs' right of action." The court said (pp. 108-109):

> It is stated, in the answer, that the ordinance was withdrawn after commencement of the action, and was not before the general council when the trial was had. But as the plaintiffs had a cause of action, withdrawal of the ordinance did not have effect to defeat their right to the relief sought, *especially as another ordinance of the same character may be hereafter introduced and passed, unless the right to do so be perpetually enjoined.* [Italics ours.]

McFarland v. *Lindekugel*, 107 Wis. 474, was a proceeding in equity to cause the removal of fences maintained by the defendant across a street passing plaintiff's premises. A suggestion was made by defendant's counsel that after the suit was commenced, and before trial, the defendant had removed the fences. The court replied (p. 478):

> This cannot affect plaintiff's right to a judgment, as the defendant might again insist upon the right to replace and maintain the obstruction.

In *State ex rel.* v. *Philips*, 97 Mo. 331, the relator brought suit to declare null and void two tax bills issued by the city engineer of the City of Kansas against property of the relator in payment for the construction of a district sewer. The trial court dismissed the petition and while the case was under advisement in an intermediate appellate court respondents filed their suggestions and motion stating that they had caused the tax bills to be cancelled by the city engineer and had deposited them, marked paid, with the clerk of the court for the use of the relator, and had paid all costs which had arisen or might arise in the suit, and moving the court to abate and strike from the docket the relator's appeal. The court of appeals did so, over the objections of the relator, who showed that he had not paid the tax bills or accepted the proffered satisfaction. On application to the supreme court of Missouri that court awarded a writ of mandamus compelling the

reinstatement of the cause on the docket, saying (p. 339):

> None of them [cases cited by the respondents], however, are exactly parallel to the case under discussion. This is no colorable appeal, no moot case, no case which has been compromised or settled; but a case where an offer has been made to the plaintiff by parties defendant; an offer which has been rejected; an offer which does not go the whole length of the plaintiff's demand, but an offer which falls far short of that; an offer which virtually confesses that he is right in his contention, but which seeks to head him off to preclude him from attaining *all* he demands. After great consideration of the subject, the conclusion has been reached that the offer made was insufficient, and did not, therefore, extinguish the plaintiff's ground of equitable relief. Nothing short of that will answer. *The plaintiff had the right to have the full measure of the relief he claimed, or else, by a solemn adjudication of the court, to know the why and the wherefore of the refusal which denied him redress in full of his demand.* He had the right to make the demand he did, and it was out of the power of the defendants to prevent adjudication of the matters demanded, except by a concession as broad as that demand. In that event, and that event only, would the issues in the cause be *dead*. It would be making a precedent of most dangerous consequence to rule otherwise; in short, it would be sanctioning a *colorable dismissal*. [Italics are the court's.]

The same view was reiterated by the supreme court of Missouri in *State* v. *Standard Oil Co.*, 218 Mo. 1 (affirmed 224 U. S. 270), where in an original proceeding under the antitrust laws of Missouri to terminate restraints of trade and oust certain corporations of their franchises, one of the respondents, the Republic Oil Company, sought to forestall a judicial determination of the issues involved and have the action abated as to it by withdrawing from business within the State, claiming that it thereby "in all respects voluntarily performed all the matters and things which the informant prays this court to compel it to do by its judgment and decree" (p. 387). But the court refused to stay its hand, saying (392–393):

> It is the formation of and entering into the pool, trust, or combination which constitute the usurpation and abuse of corporate power complained of, and which constitute the gist of this action, and the judgment of ouster is only the incident thereto; and the informant has the right to have the full measure of relief claimed, and the voluntary withdrawal of the respondent from the State does not determine the question of the existence of the pool, trust or combination it is charged with, nor satisfy the full demand of the informant. If it does, then all the other two respondents would have to do to get rid of this litigation would be to file similar affidavits with the Secretary of State, and move for a dismissal of the cause, and thereby prevent an adjudi-

cation of the questions involved, and, at the same time, escape the penalties of past sin, if guilty, and then, on the morrow, re-enter the State and continue the business as of yore in defiance of all law and good morals. No, the issues of this proceeding are not settled, and it is out of the power of the Republic Oil Company and beyond the power of all the respondents to prevent an adjudication of the matters demanded, except by a *confession as broad as are the charges* contained in the information. In that event, and in that event only, would the issues in the cause be dead. The State of Missouri and the entire people thereof are entitled to have the questions involved herein fully and finally settled. It would be making a precedent of most dangerous consequence to rule otherwise, and it would sanction not only a "*colorable dismissal*" but would afford an impenetrable retreat and perfect immunity for such corporations as might see fit to violate the laws of the State.

The prayer of the informant for a judgment of ouster against the Republic Oil Company is but one of the things asked for, but, since it has voluntarily offered to comply with that part of the complaint, that fact should be duly considered in entering the decree should the judgment of the ouster go against the respondents.

For the reasons above stated, we are of the opinion that the Republic Oil Company is not entitled to have the cause abated or dismissed as to it. [Italics are the court's.]

These authorities, we believe, sustain the proposition that the instant controversy is not moot. The appellants have yielded nothing to the petitioner's demand, have made no "concession as broad as that demand," or, indeed, any concession whatever; have acknowledged no wrongdoing in the past and given no assurance for the future. "The right to invade [the law] is not disclaimed." On the contrary, by their answer and their subsequent defense, they "claimed that the agreement [was] a perfectly proper, legitimate and salutary one." If the cause should be now dismissed without a judgment on the merits the result would be to oust the court of its jurisdiction and to deny the petitioner all relief, though its cause of action was perfect in the beginning, by a mere self-determined act of the defendants which binds no one, not even themselves, longer than they wish. They would thus be left free to do or not to do the acts which the petitioner complains of, subject only to the possibility of prosecution again at some future time; but by a parity of reasoning they might again interrupt the judicial process and forestall judgment.

If the obvious suggestion be made in opposition to this view that the *bona fides* of the change from one rule to another and its effectiveness to terminate the unlawful conditions complained of would always be proper elements for the consideration of a trial judge in determining whether grounds for an injunc-

tion existed, the conclusive answer is that the suggestion itself shows that the question now presented relates not to the present actuality of the controversy between the parties but to the propriety of awarding the relief demanded—a question going to the merits, one largely within the sound discretion of the trial court, with respect to the proper exercise of which in this instance no error was assigned.

For the reasons stated, we submit that, notwithstanding the repeal of the rule in controversy before judgment but *after* suit was brought, the case is not moot.

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JANUARY, 1918.

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POSTSCRIPT.

In his memorandum on the question whether the case is moot (received after the memorandum of the Government on the same question had been printed), counsel for appellants has interjected the following paragraph bearing on the merits of the case (p. 2):

> " This regulation [a new regulation not in the record] was adopted under the same charter power of appellant as the former rule. It is less drastic than the former rule, and also less beneficial to the grain trade, because it does not enable the farmers and country buyers to know that afternoon the Chicago price for grain 'to arrive,' as did the former rule." [Underscoring ours.]

The suggestion here thrown out that the relief asked by the Government in this case if granted will render it impossible or harder for farmers and country dealers to get information the same afternoon of the closing Chicago prices for grain "to arrive" is wholly erroneous. The relief sought by the Government would have no such effect. As heretofore pointed out in the brief and argument of the Government on the merits, the particular provision of the "Call Rule" under attack has nothing whatever to do with the prompt dissemination among farmers and others having grain to sell at country points of the closing Chicago prices for grain "to arrive."

January 28, 1918.